

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

—
No. 8662

167

OTIS BEALL KENT, *Appellant*,

v.

MARGARET BUCHANAN, *Appellee*.

—
No. 8679

OTIS BEALL KENT, *Appellant*,

v.

MARGARET BUCHANAN, *Appellee*.

—
Special Appeals from Interlocutory Orders of the District
Court of the United States for the District of Columbia.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED MAY 16 1944

Joseph W. Stewart

CLERK

OTIS BEALL KENT,
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MARGARET BUCHANAN, *Appellee*.

**Special Appeals from Interlocutory Orders of the District
Court of the United States for the District of Columbia.**

BRIEF FOR APPELLANT.

THE SUBSTANTIVE CASE.

The proceeding in which the Orders here in question were entered is a civil action by the Appellee against the Appellant (District Court No. 12,718), for alleged damages in the sum of \$700,000.00, including \$500,000.00 for an asserted

breach of a purely fabricated promise of marriage (App. 5, 9), and \$200,000.00 for imputed slander, in his having allegedly characterized the Appellee as a "prostitute and a blackmailer" (App. 4).

The Appellee is a registered nurse employed by the Appellant to attend his Mother in her last illness in 1940 (App. 2); and her instant action is in furtherance of a demand by her upon the Appellant, shortly after his Mother's death, that he give her a sufficient sum of money to insure her financial independence during the remainder of her lifetime, failing which she threatened to "drag his name through the mud from one end of the world to the other" (App. 5).

PROCEDURAL HISTORY.

1. The Appellee's Amended Complaint (App. 1-4) was filed in the District Court September 8, 1941.

2. On October 23, 1941, the Appellee filed a bill of particulars (Foot-note—App. 1) fixing the date of the Appellant's alleged promise to have married her as "on or about June 17, 1940".

3. On November 3, 1941, the Appellant's then attorney filed his original Answer (App. 4-8), merely denying the Appellee's averments in her amended complaint (a) that he had promised to marry her; (b) that he had stated that she was a "prostitute and a blackmailer"; or (c) that she then "or since the inception of his acquaintance with her" had had "the good name, fame and reputation claimed by or imputed to her in her said complaint"; *with no affirmative defense to the Appellee's demands and charges against the Appellant.*

4. On June 4, 1943, the Appellant's successor-attorney filed his Amended Answer to the Appellee's Amended Complaint (App. 9-19), reasserting the denials embodied in his original Answer, but setting forth the defensive facts first ascertained and verified by the Appellant during the pre-

ceding twenty-nine months, affirmatively supplementing his renumbered "NINTH" defense with a direct characterization of the Appellee as a "lewd, lascivious, unchaste and immoral woman", and affirmatively pleading five additional defenses, respectively renumbered "THIRD", "FOURTH", "FIFTH", "SIXTH" and "TENTH", as follows:

(a). That a decree of divorce theretofore granted to the Appellee had been fraudulent and void *ab initio*; and that, being still married to her lawful husband, she had been ineligible to have engaged herself to the Appellant, and therefore had no legal or justiciable claim against him.

(b). That the Appellee, throughout her acquaintance with the Appellant, had represented herself as having been thrice married and only twice divorced; and that she was thereby estopped to have denied her legal ineligibility to a marriage with or an engagement to marry the Appellant.

(c). That the Appellee, prior to her acquaintance with the Appellant, had lived with the husband of another woman in open adultery for more than nine years, and that she had borne a bastard child to the husband of still another woman, who had thereupon divorced her husband on a charge of adultery, with the named Appellee as co-respondent; and that the Appellee's thereby-established record of unchastity, of which the Appellant had had no intimation prior to his last preceding communication with her, then constituted a complete and conclusive defense to her alleged breach of promise action against him.

(d). That the Appellee had theretofore sued the father of her bastard child for his breach of an alleged promise of marriage, and had thereby qualified herself as "claim-minded", within the purview of the decision

of this Court in *Mintz v. Premier Cab Association, Inc.*, No. 7939, and thereby disentitled to maintain her action against the Appellant.

(e). That the Appellant, shortly after his alleged breach of his purported engagement to the Appellee, had given her a check for \$100.00, in full and final settlement of any and all her theretofore asserted claims against him.

Certified copies of authentic Court records, in verification of the facts relied upon by the Appellant, as supporting his aforesaid affirmative defenses, were appended to his Amended Answer, and are reproduced on pages 19 to 38, inclusive, of the Joint Appendix herein.

5. On June 22, 1943, the Appellee's attorney filed a Motion to Strike the Appellant's Amended Answer (App. 39); but on October 13, 1943, that Motion was denied; with a proviso however, that the Appellee might amend her Motion to Strike "by specific objections to the Amended Answer", within ten days after the authorized filing by the Appellant of "any supplementary written motions" which he might "deem appropriate" (App. 39-40).

6. On October 21, 1943, the Appellant's attorney filed a Motion to Add to his Amended Answer a "Supplemental Defense" numbered ELEVENTH", referring to and based upon the Appellee's repeated assertion in a recent deposition that she had been the "common-law wife" of the Appellant, and had so regarded and declared herself to him; whereupon the Appellant proposed to challenge her asserted right to complain of his alleged breach of his alleged "promise to have made her his wife" (App. 40-41).

7. The Appellee's permitted amendment to her Motion to Strike the Amended Answer, due under the enabling Order by or prior to October 31, 1943, was filed by her attorney on November 30, 1943, with no previously agreed ex-

tension of the filing date of record or disclosed to the Appellant by his attorney; said Motion being supported by a Memorandum of Points and Authorities filed therewith (App. 41-43), merely complaining of the lapse of time which had intervened the filing of the Appellant's original and amended Answers; objecting generally, *and not specifically as required by the enabling Order*, to all the defenses particularized in the Amended Answer extraneous to those negatively embodied in the original Answer, as legally insufficient or as "mere pleading of evidence by way of mitigation if anything"; and objecting to the Appellant's proposed inclusion in his Amended Answer of his suggested "ELEVENTH" defense, as legally insufficient in the absence of a "common-law marriage" whereby the Appellee might have been "recognized by the law" as the common-law wife of the Appellant.

8. On December 7, 1943, the first of the two interlocutory Orders hereby sought to be annulled was entered by Mr. Justice Letts of the District Court, specifically granting the Appellee's Motion to Strike, as to all the aforementioned affirmative defenses numbered "THIRD", "FOURTH", "FIFTH", "SIXTH" and "TENTH", and as to the aforesaid affirmative supplement to the "NINTH" defense, with "ten days leave" to the Appellant "within which to refile said Amended Answer, with said numbered defenses not included therein"; and specifically denying the Appellant's Motion for leave to have filed his aforesaid proposed ELEVENTH defense (App. 44). No juridical reason or precedential authority was cited or expressed by the Court in support or justification of his aforesaid Order, saving only the implication in the preamble thereto that it was based "upon consideration" of the specified pleadings and the arguments of counsel thereon.

9. On December 31, 1943, the Appellee's attorney filed a Motion for a Judgment by Default against the Appellant, with a supporting Memorandum of Points and Authorities,

based upon the Appellant's omission to have complied in terms with the aforesaid Order, requiring him within ten days to have refiled his Amended Answer with the specified defenses "not included therein" (App. 45-46).

10. On January 17, 1944, the second of the Orders herein challenged was entered by Mr. Justice Goldsborough, denying the Appellee's Motion for a Judgment by Default against the Appellant, but in terms requiring the latter within ten days to refile an emasculated Amended Answer, in conformity with the antecedent directions of Mr. Justice Letts (Order—App. 46-47).

11. On Petitions duly filed by the Appellant with this Honorable Court, the Special Appeals therein prayed against the aforesaid Orders were allowed, with a directed stay of interim action by the District Court; and with a direction that the instant Appeals be consolidated, and that a Consolidated Record be prepared in conformity with the governing Rules (Order—App. 48-49). The latter Record was duly prepared and seasonably filed; and the Joint Appendix to the Briefs of the respective parties, including the requisite Statement of Points on Appeal, pages 49-56, is herewith respectfully submitted.

DELIMITATION OF ISSUES.

The 57 cumulative and 31 severally-enumerated Points on Appeal (App. 49-56) may be consolidated and will be hereinafter considered *seriatim*, as follows:

I. The Order requiring an emasculation of the Appellant's Amended Answer should be annulled, as denying his legal right to plead every fact and factual circumstance of which he may legally avail himself against the aggressions of the Appellee.

II. The averments supporting the defenses ordered stricken from the Amended Answer are of *ultimate facts*, and involve no inhibited *pleading of evidence*.

III. The Order of Mr. Justice Letts should be annulled, as either flouting or abrogating established legal principles, vouchsafing to the Appellant complete and conclusive defenses to the Appellee's claims against him, as follows:

1. The invalidity of the Appellee's divorce, as rendering her ineligible to remarriage or to an engagement to the Appellant.

2. The Appellee's admissions to the Appellant that she had been *thrice married* and only *twice divorced*, as indicating a marital status incompatible with her alleged engagement to the Appellant, and as negating her pretension that he had ever so committed himself.

3. The Appellee's prior record of unchastity, unknown to the Appellant at the time of his alleged promise of marriage, as vitiating any agreement based thereon.

4. The Appellee's "vexatious suit" against the father of her bastard child, alleging promises on dates when she had known that he was married to another woman, as tending also to belie her pretense of an actionable promise of marriage by the Appellant.

5. The Appellee's record of unchastity, as defensively tending to justify her alleged characterization as a "prostitute".

6. The Appellee's acceptance of the Appellant's check for \$100.00, in full and final settlement, accord and satisfaction of her claims against him.

IV. The Order in question illegally denied the Appellant's right to plead in his proposed ELEVENTH defense the admitted fact that the Appellee had long and consistently regarded herself as his "common-law wife" and NOT his mere fiancée, as belying her pretension that he had breached an alleged promise to marry her.

V. The Order in question illegally denied the Appellant's right to plead and prove the defenses ordered stricken

from his Amended Answer, in mitigation of any damage to which a biased jury might deem the Appellee to be entitled.

VI. The requirement in the Order of Mr. Justice Goldsborough that the Appellant comply in terms with the Order of Mr. Justice Letts, directing an emasculation of the Appellant's Amended Answer, should be annulled as arbitrary and void, in its involvement of judicial determinations of substantively defensive issues not submitted to nor legally cognizable by the Motions Court on the Appellee's Motion for a Judgment by Default against the Appellant.

ARGUMENT.

I. THE ORDER REQUIRING AN EMASCULATION OF THE APPELLANT'S AMENDED ANSWER SHOULD BE ANNULLED, AS DENYING HIS LEGAL RIGHT TO PLEAD AND PROVE EVERY FACT AND FACTUAL CIRCUMSTANCE OF WHICH HE MAY LEGALLY AVAIL HIMSELF AGAINST THE AGGRESSIONS OF THE APPELLEE.

As intimated in both the Appellant's original and amended Answers (App. 6, 15), the claims of the Appellee therein controverted reek with the implications of blackmail; and it is therefore the inalienable right of the Appellant, and eventually perhaps of importance to the Cause of Public Justice, that he be permitted to resist the aggressions of the Appellee with every defensive weapon to the use of which he may be legally entitled.

Mr. Justice Letts in Motions Court had previously and categorically denied the Motion of the Appellee to strike the Amended Answer, with a *purely concessive proviso* that her attorney might seasonably "amend by specific objections" (App. 39-40). Instead of so "amending" her Motion to Strike, however, the Appellee's attorney merely filed a so-called "Supplement" to said Motion, *textually phrased in its application to the ENTIRE AMENDED ANSWER in the identical terms of the overruled Motion,*

with no indication of "specific objections", and supported merely by generalizations "*in opposition to said Amended Answer*" *in its entirety*.

The Appellant, uninformed until nearly four weeks after the due-date prescribed in the enabling Order (App. 40), as to any previously agreed extension thereof, and there-upon assuming that the Appellee had waived her right to "amend" as therein provided, was afforded no opportunity to answer the aforesaid generalizations; and the case was submitted on the MEMORANDUM OF POINTS AND AUTHORITIES propounded *ex parte* by the Appellee (App. 42-43), with no comprehensive oral argument by either attending counsel, as to the *determinative legal issues necessarily to have been considered in a proper adjudication of the impending Motion*.

The Court, therefore, only meagerly if at all informed as to the law of the case, granted the Motion of the Appellee to Strike from the Amended Answer *every defense therein comprised extraneous to the general issue denials in the original Answer* (App. 44); thereby reverting and restricting the Appellant to the limited defensive recourse provided in said answer, as fully and effectually as might have been accomplished if the Court had granted the original Motion of the Appellee to Strike the Amended Answer *in its entirety*.

Inasmuch, moreover, as the Appellant may not have proved any unpleaded fact, the inevitable effect of the emasculating order, if not annulled, would have been to exclude all the proffered evidence in confirmation of the Appellee's unholy past, and to have divested the Appellant of his legally-unquestionable right to have proved the invalidity of her divorce from a lawful husband, her prior institution of another "vexatious suit" for a breach of promise of marriage, her voluntary "admission" to the Appellant of a continuing "marriage" to a purported "third husband", her acceptance of a check in acknowledged release of her pretensions against the Appellant, and her

assertion of a common-law marital relationship with the Appellant, as well as her voluminous and astounding antecedent record of unchastity, not only in mitigation of any damages to which she might unrighteously be held by a sympathetic Jury to be entitled, but as *substantive, complete and conclusive defenses to all her impending claims against the Appellant.*

Regardless of any other inherent vice or infirmity, therefore, as hereinafter particularized, the Order of Mr. Justice Letts should be annulled as legally unwarranted, ill-considered and void.

II. THE AVERMENTS SUPPORTING THE DEFENSES ORDERED STRICKEN FROM THE AMENDED ANSWER ARE OF ULTIMATE FACTS, AND INVOLVE NO INHIBITED "PLEADING OF EVIDENCE".

In the absence of any "specific objections to the Amended Answer", as required by the Order permitting the Appellee to "amend" her Motion to Strike, either in the "Supplement" thereto or in the accompanying Memorandum of Supporting Points and Authorities (App. 41-43), the Appellant is frankly unable to identify any portion of the text of the several defenses ordered stricken from the Amended Answer (App. 10-14, 18-19) which is not, in his well-considered if humble judgment, indispensable to the succinct assertion of an *ultimate fact* advisedly relied upon by him in defense to the Appellee's impending claims against him.

Indulging no pride of authorship of the Amended Answer, however, and disclaiming any skill as a pleader in the formulation thereof, the Appellant is willing and ready, with the sanction of this Honorable Court, to amend his aforesaid Answer or any part thereof which may be justifiably objectionable to the Appellee's attorney, as the latter may suggest, provided only that the Appellant be not thereby divested of his right to prove any *ultimate fact* recited in said Answer as defensive to the Appellee's aforementioned claims.

In any event, the Appellant, in more than thirty-five years of active practice, has never encountered a more flagrant exemplification of a pleading of evidence than will be observed in the Appellee's Amended Complaint (App. 1-4), wherein she has predicated a vicious and preposterous claim against the Appellant for \$200,000.00, upon her imputation to him of responsibility for an unsupported tissue of unfounded rumors of anonymous telephone calls, which he has righteously disclaimed and for which he can never be justly charged with even contributory accountability.

The Order in question, therefore, should be annulled in so far as it may have sought to divest the Appellant of his right to prove any fact asserted in his Amended Answer, even though it may be held to have pleaded evidence, if any infirmity of pleading thereupon determined may have been and still may be corrected by authorized and proper amendment.

III-1. THE ORDER OF MR. JUSTICE LETTS SHOULD BE ANNULLED, AS HAVING DENIED THE APPELLANT'S RIGHT TO PLEAD AND PROVE THE INVALIDITY OF THE APPELLEE'S PURPORTED DIVORCE FROM HER LAWFUL HUSBAND, AND HER CONSEQUENT INELIGIBILITY TO REMARRIAGE OR TO AN ENGAGEMENT OF MARRIAGE TO THE APPELLANT, AS CONSTITUTING A COMPLETE AND CONCLUSIVE DEFENSE TO HER BREACH-OF-PROMISE ACTION AGAINST HIM.

Factual Summary: As noted in the THIRD defense in the Appellant's Amended Answer (App. 10-11), the Appellee was awarded a decree of divorce from her husband, by the City Circuit Court of Richmond, Virginia, on March 6, 1930 (App. 25-26); but the Appellant has proved by the present record, or is prepared supplementally to prove, that she had deliberately falsified the following jurisdictional averments in her complaint (App. 20):

(a). That she was, at the time of filing said complaint “an actual *bona fide* resident of the State of Virginia”;

(b). That she had then resided in the State of Virginia “for a period of more than one year”;

(c). That she had then “been domiciled in the City of Richmond” for “more than one year”;

(d). That she had “last lived and cohabited” with her husband as his “wife at Richmond, Virginia”;

(e). That she had “not cohabited” with her husband “since having had knowledge of the adultery committed by him”;

(f). That the alleged adultery had not been committed by “procurement or connivance” of the Appellee;

(g) That the alleged co-respondent had been a “woman by the name of Jenny”; and

(h). That the Appellee had subsequently learned that her husband had “lived with the same woman for five months as man and wife”.

The Appellant has proved or is prepared to prove the following additional facts in derogation of the aforesaid divorce:

(i). The alleged divorce was procured by the deliberate collusion of the Appellee and her husband;

(j). The attorney representing the Appellee had been employed, and his fee had been paid, by the husband of the Appellee;

(k). The Appellee’s husband might have defeated her bill of divorce by a plea of recrimination, as he knew that she had repeatedly committed adultery in their own home with the husband of another woman; and that she had been living with her said paramour for more than eighteen months preceding the filing of her complaint;

(l). The Appellee knew the identity of the actual co-respondent, and refrained from naming her in the complaint, in deference only to the fact that the Appellee's husband, with her knowledge, then intended to marry, and he afterwards married the co-respondent.

(m). The husband's alleged "confession" of adultery was not "corroborated" in good faith, as required by the governing statutes;

(n). The Appellee's husband, at the time of the Appellee's filing of her suit for divorce, was not and for some time had not been domiciled in the City of Richmond;

(o). The appellee's husband did not appear at the hearing of his wife's complaint, either in person or by attorney, and did not otherwise contest her suit;

(p). The court by which the decree of divorce was entered was wholly devoid of jurisdiction over either of the parties or over the subject matter of the suit;

(q) The Appellee was expressly forbidden by the decree to remarry within six months from the date thereof; but she had then been living with her married paramour and using his name for more than eighteen months, and her meretricious relations with him were in no wise interrupted by her purported action for divorce.

The *Law of the Case* propounded in the decisions hereinafter cited unequivocally sustains the Appellant's legal right to challenge the Appellee's purported divorce, as null and void *ab initio*, leaving her still married to her husband and therefore ineligible to a lawful engagement to the Appellant, and legally disentitled to assert her breach-of-promise claims against him.

(a). *The invalidity of a divorce theretofore procured by the plaintiff in a breach-of-promise suit may be availed of by the defendant as a complete defense to her action.*—In *Williams v. Igel*, 116 N. Y. S., 778, the plaintiff in a breach-

of-promise suit was held ineligible to have married the defendant, because of the invalidity of a prior divorce awarded to her by a court without jurisdiction; and her complaint was thereupon dismissed on the ground that:

While it is true that the rule is that no one may question the validity or constitutionality of a statute, except a person affected by the provisions of the statute, in the case at bar I am of the opinion that where plaintiff seeks to enforce a right of contract, or rather seeks damages for a breach of contract, the court has the right to examine the record to ascertain whether plaintiff had the right to make the contract, and particularly where a question of public policy or public morals is involved. If plaintiff was in no position to carry out her contract, and the contract or promise of marriage is based upon a mutual promise or agreement to marry, how can she obtain or recover damages for a breach of contract that she was legally unable to perform? The plaintiff at the time of the promise of marriage * * * was still in the eye of the law, * * * the wife of another; and she had no legal right to marry, or to enter into a contract of marriage; and for this reason I am of the opinion that she is not entitled to recover.

In *Adair v. Adair*, 206 App. Div., 394, 201 N. Y. S., 398, the defendant in a breach-of-promise action intervened in a suit by the plaintiff against her husband, to annul their marriage on the ground of his fraudulent misrepresentation that he had not theretofore been married. Upon the husband's default after service by publication, the marriage was annulled; and he never challenged the decree. The intervenor, however, sought to have the decree of annulment vacated, on the purported ground that the service in the prior action by publication had perpetrated a fraud on the court; his real objective being to secure a continuance of the marriage status of the woman, as constituting an affirmative defense to her suit against himself. The trial court held that the mere collateral benefits inuring to him through an abrogation of the annulment decree did not constitute such an interest in the collateral action as to justify

the granting of his petition, which was thereupon denied. The Appellate Division, however, distinguished the right of a party in such a case to challenge the application of a merely voidable decree, and the reliance of such a party upon the ineffectuality of a similar decree which is void *ab initio* on jurisdictional or other grounds, and, on the authority of *Berlinsky v. Berlinsky*, 204 App. Div., 480, 198 N. Y. S., 402, sustained the intervenor's right to plead the invalidity of the subject decree in any action in which it might be involved.

(b). *A divorce decree entered by a court without jurisdiction of the subject matter as well as of the parties is a legal nullity, and may be challenged by any person not a party to the proceeding wherein the decree was entered, who may be thereby adversely affected.*—In *Andrews v. Andrews*, 188 U. S., 14, the Supreme Court of the United States declared:

The statute of South Dakota made domicile, and not mere residence, the basis of divorce proceedings in that State. As * * * domicile in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect, and as the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter, where it was wanting because of the absence of domicile within the state, we conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the Supreme Judicial Court of Massachusetts in obeying the command of the state statute and refusing to give effect to the decree of divorce in question.

In *German Savings & Loan Soc. v. Dormitzer*, 192 U. S., 125, 128, Mr. Justice Holmes, speaking for the Supreme Court of the United States, observed:

“It is now too late to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the

record purports to show jurisdiction and the appearance of the other party. (*Andrews v. Andrews*, 188 U. S., 14.)

In *Davidson v. Ream*, 161 N. Y. S., 73 affirmed in 164 N. Y. S., 1037, the Appellate Division affirmed a judgment vacating a former decree annulling the plaintiff's marriage, on the ground of fraud on the part of her husband and his attorney, and said:

Vital facts, which would undoubtedly have affected the judgment of the court, were withheld, either intentionally so as to procure a result different from that which would have been otherwise adduced, had they been presented, or under the innocent but mistaken belief that they would not affect the results. In either event, the effect upon the judgment is the same. Had the court been advised that each of the * * * findings by the Referee, which entered into his decision, was contrary to the undisputed fact, it cannot be doubted but that the judgment declaring the marriage void would not have been entered.

In *Doughty v. Doughty*, 27 N. J. Eq., 315, an action to annul a prior divorce decree on the ground of fraud, the court said:

Under the authority of these cases, it is clear it is competent for this court, upon an allegation that a judgment is founded in fraud, to inquire whether the cause of action spread upon the record is wholly fictitious and groundless, and also whether the plaintiff fraudulently withheld from the court pronouncing it any fact which, if disclosed, would have shown he had no cause of action; * * * *Judgments in suits for divorce have been repeatedly adjudged void, on the ground that the cause of action set out in the pleadings was fabricated by the plaintiff.* (Italics added.)

To the same effect see also *Willman v. Willman*, 57 Ind., 500; *Abercrombie v. Abercrombie*, 67 P., 539; *Edson v. Edson*, 108 Mass., 590; *State v. Whitcomb*, 2 N. W., 970; *In Re Goldberg's Estate*, 5 N. E. (2), 863; *Neff v. Beauchamp*, 36 N. W., 905; *Rumping v. Rumping*, 91 P., 1057.

(c). *An invalid divorce decree may be set aside at any time by any court in any collateral proceeding wherein a party may be thereby adversely affected.*—In *Noffsinger v. Noffsinger*, 71 W. L. R., 880, the attorney for the Appellee herein succeeded in setting aside a Reno divorce decree invoked by his then client's husband against her in a maintenance suit, on the ground of fraud in his procurement of the decree. *It will be noted by a comparison of the facts in the respective cases, however, that the fraud so invoked in the latter case was not nearly so flagrant as that perpetrated by the Appellee in procuring her spurious divorce decree here in question.*

As announced by this Court in *Ruppert v. Ruppert*, 71 W. L. R., 638, its prior decisions in *Simmons v. Simmons*, 57 App. D. C., 216, 19 Fed. (2), 690, and *Frey v. Frey*, 61 App. D. C., 232, 59 Fed. (2), 1046, were overruled in *Goodloe v. Hawk*, 113 Fed. (2), 753, in so far as the superseded decisions had disregarded the laches and estoppel doctrines in determining the effect to be accorded to irregular foreign divorces; but the substantive principles therein expounded are apparently still the law of the case in any situation in which there is no implication of laches or estoppel.

In the *Simmons Case*, *supra*, the defendant was living in the District with a woman whom he knew to be married to another man. Her husband provided the funds wherewith she sued him for an absolute divorce in Virginia, on the ground of his alleged desertion; her decree being fraudulently based also upon her misrepresentation to the Virginia court of her required antecedent residence in that State. Shortly after the granting of her divorce, she married her paramour, whom she shortly thereafter sued for divorce in the District, charging adultery. He filed a cross-bill praying for an annulment of his *de facto* marriage to the plaintiff, on the ground of the invalidity of her putative divorce from her husband. The trial court declined to aid the cross-complainant in his efforts to evade the legal consequences of his marriage, and awarded to the wife an ab-

solute divorce. The paramour-husband appealed; and the decree in favor of his wife was reversed by this Court, with directions to enter a decree of annulment of the marriage as void *ab initio*, because of the ineffectuality of the fraudulent divorce decree of the Virginia court.

In *Frey v. Frey, supra*, a legally-married couple residing in Virginia established their residence in Washington; and shortly thereafter the woman left her husband and entered upon adulterous relations with Frey. Her husband sued her for divorce, naming Frey as corespondent. He persuaded the husband to dismiss his action, and permit his wife to secure a divorce from him in Virginia, on the purported ground of desertion. The divorce was granted as prayed; and eventually the woman and her paramour were married. In the meantime, her lawful husband, assuming the validity of his *pro forma* divorce, had married another woman, by whom he had had two children. Thereafter the woman sued her second "husband" for a limited divorce and maintenance; to which he countered with a suit for an annulment of his *de facto* marriage to her, as invalid and void *ab initio*, by reason of the invalidity of her antecedent divorce. The District Court denied the woman's petition for separate maintenance, and granted the cross-complainant's bill for annulment, on the grounds that the appellee Frey, a lawyer, had devised and assisted the plaintiff in the perpetration of a fraud on the court which had granted the divorce; in that the suit was, and was known by all the parties to have been, collusive; the plaintiff was not then domiciled in Virginia, and had not been so domiciled for more than a year preceding the filing of her suit, as alleged in her petition; she had not been an actual resident of the county in which she had filed her suit; both she and the defendant had arranged that perjured testimony should be given to secure the decree; the plaintiff's then husband had had a complete defense to her suit in Virginia, which defense both he and Frey had concealed from the Virginia court, as he had had also valid grounds for an absolute

divorce from his wife in the District of Columbia, which he had been induced by the appellee to abandon, upon his misrepresentation that a valid decree could and would be obtained in Virginia. The decree of the District Court annulling the second marriage was affirmed by this Court, on the ground that the Virginia divorce had been null and void *ab initio* for lack of jurisdiction of the court which had granted it; and that the subsequent ceremonial marriage based thereon was likewise illegal, ineffectual and void, notwithstanding the fact that the plaintiff's former husband and his second wife had two children, who might be adversely affected by the decreed nullification of the divorce which had preceded their birth and the presumptive legal marriage of their parents.

See also the decisions of this Court in *Benson v. Benson*, 40 Fed. (2), 159; *Friedenwald v. Friedenwald*, 16 Fed. (2), 509, 57 App. D. C., 13; *Holt v. Holt*, 77 Fed. (2), 538, *Sears v. Sears*, 92 Fed. (2), 530.

The juridical principles applied by this Court in its afore-mentioned decisions were recently reaffirmed in *Ruppert v. Ruppert*, 77 U. S. App. D. C., 65, 134 Fed. (2), 497, 71 W. L. R. 638, *supra*, wherein a divorce decree of the District Court was remanded "for findings of fact and conclusions of law upon the issues of fraud upon the Virginia court" which had granted a divorce decree to one of the parties against her former husband; the latter decree being held in effect by this Court to have been subject to collateral attack by the appellee therein, who had not been a party to the original action.

(d). *In reviewing a foreign decree impeached for jurisdictional fraud, evidence extraneous thereto may be considered by the reviewing court, notwithstanding the fact that the decree may assert jurisdiction, and no fraud may be apparent on the face of the record.*—In *Re Vetter's Estate*, 308 Pa., 447, 162 A., 303, it was held that:

The full faith and credit clause of the Federal Constitution does not prohibit an inquiry into all the cir-

cumstances touching a matter cognizable solely in our courts, even though the decree or judgment of a court of another jurisdiction is involved in that investigation; and if fraud underlies such judgment or decree it will be of no effect in deciding the matter before the court. Therefore under the allegation of fraud all reasons, acts, or conduct underlying or making up the decree or judgment are open to investigation, when the effect of such decree or judgment is to prejudice the rights of third parties not parties to it.

To the same effect see also *Thompson v. Whitman*, 85 U. S., 457, 21 Law Ed., 897; *Knowles v. Gas Light Company*, 19 Wall., 58; *Pennoyer v. Neff*, 95 U. S., 714; *Bell v. Bell*, 181 U. S., 175; *Streitwolf v. Streitwolf*, 181 U. S., 179; *Shields v. Shields*, 26 Fed. Supp., 211; *Bower v. Casanave*, 44 Fed. Supp., 501; *Downs v. Allen*, 22 Fed., 805; *Murray v. Magnolia Pet. Co.*, 23 Fed. (2), 347; *Drummond v. Lynch*, 82 Fed. (2), 806; *Sewall v. Sewall*, 122 Mass., 156, 23 Am. Rep., 299; *Adams v. Adams*, 13 L. R. A., 275.

(e). *A mere lapse of time intervening the entry of a judgment and a collateral attack upon it in a foreign jurisdiction does not affect the right of a party to impeach it, if it was entered by a court without jurisdiction of the parties and of the subject matter.*—In *Holyoke v. Haskins*, 5 Pick., 20, Affirmed in 9 Pick., 259, a case was reopened and an invalid judgment annulled TWENTY YEARS AFTER THE RENDITION OF THE JUDGMENT. In *Wales v. Wales*, 2 Mass., 120, a probate judgment was set aside TWENTY YEARS AFTER THE DEATH OF THE DECEDENT; and in *Bellows v. Stone*, 14 N. H., 203, the invalidating action was taken MORE THAN ELEVEN YEARS AFTER THE ENTRY OF THE DECREE.

See also *Adams v. Adams*, 51 N. H., 388, 12 Am. Rep., 134; *Sumner v. Parker*, 7 Mass., 82; *Jochumsen v. Suffolk Bank*, 85 Mass., 87, and cases therein cited.

(f). *A stranger to a judgment may legally challenge its jurisdictional infirmities in circumstances in which a party*

to the proceeding in which the judgment was rendered would be estopped to impeach it.—In *The W. Talbot Dodge*, 15 Fed. (2), 459, 461, it was held that a decree of a foreign court in admiralty is “open to collateral attack by a stranger to the record, in the courts of this country and of England, if it can be shown that fraud was practiced on the court in obtaining it”.

In *Nason v. Blaisdell*, 36 Am. Dec., 331, it was held that “a judgment rendered in such circumstances is of no more force, as against strangers, than if the record had been forged”.

In *Bennett v. Wilson*, 65 P., 880, 882, it was said:

Such judgments, it seems, may be attacked by strangers to the record whose rights, *whether existing at the time of the judgment or afterwards acquired*, are affected, i.e., by persons who, not being parties to the record * * * have no remedy against the judgment by appeal or otherwise in the case itself. (Italics added.)

As to the right of a third person to impeach a judgment whereby he is adversely affected, and to the proceedings eventuating in the entry of which he was not a party, see also *Hall v. Hall*, 122 N. Y. S., 401; *Brownell v. Snyder*, 122 App. Div., 246, 106 N. Y. S., 771; *Williams v. Martin*, 7 Ga., 377, 381; *Atkinson v. Allen*, 36 Am. Dec., 361; *Downs v. Fuller*, 9 Metc., 135, 35 Am. Dec., 393; *Greene v. Greene*, 2 Gray., 361; *Dobson v. Pearce*, 12 N. Y., 156; *White v. Glover*, 123 N. Y. S., 482; *Prudham v. Phillips*, 2 Amb., 763; *Davidson v. Ream*, 161 N. Y. S., 73, 97 Misc. Rep., 89; *Ward v. Boyce*, 46 N. E., 180; *De Armond v. Adams*, 25 Ind., 455; *Lee v. Back*, 30 Ind., 148; *Rabbitt v. Weber*, 130 N. E., 787; *Simmons v. Hefter*, 139 N. E., 404; *Bernero v. Bernero*, 2 N. E. (2), 317; *Quine v. Mayes*, 2 Rob. (La.), 510; *Thomas v. Breedlove*, 6 La., 577; *Conery v. Rotchford*, 30 La. Ann., 692; *Smith v. Cuyler*, 3 S. E., 406; *Staunton Perpetual Building & Loan Co. v. Haden*, 23 S. E., 285; *Wilson v. Williams*, 41 S. E., 629.

It is thereupon respectfully submitted that the Order proposing to divest the Appellant of his right to challenge the invalidity of the Appellee's purported divorce, as constituting a complete and conclusive defense to her breach-of-promise action against him, should be annulled.

III-2. THE APPELLANT IS LEGALLY ENTITLED TO PLEAD AND PROVE THE APPELLEE'S ADMISSIONS TO HIM THAT SHE HAD BEEN THRICE MARRIED AND ONLY TWICE DIVORCED, AS INDICATING A MARITAL STATUS INCOMPATIBLE WITH HER ALLEGED ENGAGEMENT TO HIM, THEREBY NEGATIVING HER PRETENSION THAT HE HAD EVER SO COMMITTED HIMSELF, AND CONSTITUTING AT LEAST A CONSTRUCTIVE DEFENSE TO HER BREACH-OF-PROMISE CLAIMS AGAINST HIM.

The Order here under review (App. 44) directed the Appellant to strike the FOURTH defense from his Amended Answer, wherein he had declared that, until a date some time subsequent to his last communication with the Appellee, he had accepted as true her repeated representations to him and in his presence that she had been theretofore married three times and divorced only twice, and that she was therefore still married to her undivorced third husband and the father of her then purported legitimate child.

The Appellant then had been for nearly thirty-three years a member of the Bar of this Honorable Court, in unobtrusive but tacitly good repute; and he was and long had been conversant with at least the rudiments of the Law of Domestic Relation, including the elementary principle that a single man may not legally engage himself to marry a woman already married to another man, from whom she has not been legally and finally divorced.

Title 30, Chap. 1, Sec. 1, of the 1940 Edition of the District Code expressly interdicts "the marriage of any per-

sons either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce", as "absolutely void *ab initio*, without being so decreed."

Regardless of inhibitory legislation, as stated in *Vnuk v. Patterson*, 247 P., 766, 768:

This public policy as to a promise to marry, when it is known to both that one of the parties has an undivorced spouse then living, is part of the common law, and does not depend upon any legislative enactment. (*Noice v. Brown*, 20 Am. Rep., 388, affirmed in 23 Am. Rep., 213; *Johnson v. Iss*, 85 S. W., 79; *Paddock v. Robinson*, 14 Am. Rep., 112; *Gullick v. Gullick*, 41 N. J. L., 13; *Haviland v. Halstead*, 34 N. Y., 643.)

As of possible historical interest to the same effect, the Appellant has *personally digested* and respectfully refers to the decisions also in *Williams v. Igel*, 116 N. Y. S., 778; *Leupert v. Shields*, 60 P., 139; *Strasberger v. Rosenheim*, 255 N. Y. S., 316; *Moore v. Blanck*, 129 N. Y. S., 1105; *Gray v. Hook*, 4 N. Y., 449; *Boyd v. Boyd*, 114 N. Y. S., 361; *Coffey v. Burke*, 116 N. Y. S., 514; *Smith v. Hall*, 38 A., 386; *Szlauzis v. Szlauzis*, 99 N. E., 640; *Sanctuary v. Cary*, 153 A., 316; *Rich v. Fulton*, 177 N. W., 175; *Miskell v. Murray*, 204 Ill. App., 567; *Stevens v. Connors*, 249 P., 64; *Smith v. McPherson*, 167 P., 875; *Knox v. Parkins*, 86 N. H., 66; *Olson v. Saxton*, 69 P., 119; *Davis v. Davis*, 101 P. (2), 313; *Prevost v. Wood*, 21 Times L. R. (Eng), 684; *Caulfield v. Arnold*, 1 D. L. R., 295; *Howard v. Adams*, 105 P. (2), 971; *Hilbert v. Kundicoff*, 268 P., 905; *Littlehead v. Clinton*, 60 P. (2), 612; *Haviland v. Halstead*, 34 N. Y., 643; *Kastner v. Stein*, 225 N. Y. S., 442; *Carter v. Rinker*, 174 Fed. 882; *Leaman v. Thompson*, 86 P., 926; *Kelley v. Riley*, 106 Mass., 339; *Kerns v. Hagenbuehle*, 17 N. Y. S., 367; *Cammerer v. Muller*, 14 N. Y. S., 511; *Drennan v. Douglas*, 40 Am. Rep., 595; *Strickland v. Anderson*, 196 S., 184; *Davis v. Pryor*, 112 Fed., 274; *Elmore v. Haddix*, 71 S. W., 620; *Jones v. Sovereign Camp*, 35 Fed. (2), 345; *Eve v. Rodgers*, 40 N. E., 25; *Spiers v. Hunt*, 1 K. B., 720; *Wil-*

son v. Carnley, 1 K. B., 729; *Drake v. Lauer*, 86 N. Y. S., 986, affirmed in 182 N. Y., 533; *Drake v. Siebold*, 30 N. Y. S., 697; *Roberts v. Criss*, 266 Fed., 296; *Attridge v. Pembroke*, 256 N. Y. S., 257.

The Appellant, therefore, believing that the Appellee was undivorced from a living husband, and being cognizant of the legal principles applying to and determining such relations, must reasonably be assumed not to have essayed the futile gesture of engaging himself to a woman then ineligible to have married him, even if he had been deeply interested in her, as he assuredly was never less interested in any woman of his acquaintance.

The Appellant is unquestionably entitled, therefore, to plead and prove his acceptance of the Appellee's aforesaid representations concerning her marital status, as unreservedly true, and his belief thereupon that he might not legally have engaged himself to marry her, as belying her pretensions in the instant case that he had ever so entangled himself.

Whereupon, it follows that the Order directing the Appellant to strike the FOURTH defense from his Amended Answer, is illegal and void, and should be set aside by this Honorable Court.

III-3. THE ORDER OF MR. JUSTICE LETTS SHOULD BE ANNULLED, AS HAVING DENIED THE APPELLANT'S RIGHT TO INVOKE THE APPELLEE'S PRIOR RECORD OF UNCHASTITY, UNKNOWN TO HIM AT THE TIME OF HIS ALLEGED PROMISE TO HAVE MARRIED HER, AS A COMPLETE AND CONCLUSIVE DEFENSE TO HER BREACH OF PROMISE ACTION AGAINST HIM.

Factual Summary: As stated in the FIFTH defense, (App. 12-14), the Appellee is shown thereby, and by certified copies of court records thereto appended as Exhibits C-1, C-2, D-1, D-2, D-3 and E (App. 28-38), as well as by admissions under oath in certain depositions awaiting in-

troduction before the District Court, to have lived for more than nine years, intermittently, in open and notorious adultery with the husband of another woman; and to have borne a bastard child to the husband of still another woman, who had divorced him in an action wherein she had named the Appellee as co-respondent.

It may be judicially deemed unlikely that a woman now forty-four years old, who had preoccupied herself for nearly ten years with proved meretricious interests, and who had fraudulently divorced her only lawful husband, as hereinabove detailed under Caption III-1, after having lived with him for less than six years, had led an otherwise blameless and uneventful existence through the remainder of her adult years before her introduction to the Appellant in the Fall of 1939.

There is sufficient evidence already available in the case to justify an imputation to the Appellee of numerous additional digressions from the straight and isolated path of virtue; but, regardless of the provable facts in the latter respects, her aforementioned interludes with two husbands of other women, and her bearing of a bastard child to one of them, as to none of which details she had apprised the Appellant, and of which he had received no intimation from any other source until several weeks subsequent to his last communication with her, would have disqualified her for any *unwilling* marriage to the Appellant, and constitute, a complete and conclusive defense to her breach-of-promise action against him.

The Law of the Case: The law generally applicable in breach of promise suits, and specifically determining the defensive rights of the Appellant in the instant action, may be summarized as follows:

(a). *A woman's prior unchastity, unknown to a man at the time of his promise to marry her, is a complete defense to any breach-of-promise action which she may file against him.*—When a woman sues a man for a breach of his promise of marriage, she unreservedly puts in issue every past

volitional act of her life reflecting in any wise upon her moral character or her reputation for decency and virtue. As held in *Weeks v. Russell*, 87 Tenn., 442, 10 S. W., 771:

The plaintiff by her suit necessarily tenders an issue as to her character. By her action she declares herself suitable for a wife and the mother of a family, and invites the defendant to controvert her assumption. Upon her character and conduct depend her chances for recovery.

There is no principle of the substantive law more clearly and irrevocably established than that the proved unchastity of a woman prior to her engagement to any man, if then unknown to him, will absolve him from any obligation to marry her, and *a fortiori* will immunize him against any claim for damages which she may thereafter assert against him because of a breach of his promise of marriage.

In *McKane v. Howard*, 202 N. Y., 181, 95 N. E., 642, a judgment for the plaintiff (138 App. Div., 680, 123 N. Y. S., 632), affirming a judgment of the trial court in her favor, was reversed; and a new trial was ordered on the grounds, *inter alia*, that:

His defense that plaintiff was unchaste when she received his promise, given in ignorance of that fact, was legitimate even as would have been the defense, if alleged, that she obtained the promise through express fraud or was insane or diseased, or malformed or impotent. It attacked her cause of action at its core, and, if found proven by the jury, defeated it precisely as would have the establishing of either of those defenses. * * * The proposition that illicit intercourse of the plaintiff prior to the promise and then unknown to the defendant * * * is a defense to the action is fundamental and established beyond the reach of discussion. The law, through implication, reads into the promise of either party to the engagement the representation of chastity and physical qualification for the relation, which, if false or a misrepresentation, constitutes a fraud vitiating the whole contract. (*Boynton v. Kellogg*, 3 Mass., 189, 3 Am. Dec. 122; *Palmer v. Andrews*, 7 Wend., 142; *Kniffen v. McConnell*, 30 N. Y., 285;

Goddard v. Wescott, 82 Mich., 180; *Budd v. Crea*, 6 N. J. L., 730.)

In *Barrett v. Vander-Meulen*, 264 Ky., 441, 94 S. W. (2), 983, 985, the Court of Appeals of Kentucky reversed a judgment for the plaintiff in a breach of promise suit, notwithstanding the fact that the parties had "engaged in repeated sexual relations," on the ground that:

The presumption of virtue always exists. If upon the strength of that presumption, and in innocence of any misconduct, one enters into an agreement to marry, and it develops that the other contracting party was not of that purity of virtue so impliedly represented and relied upon, there is fraud which vitiates the contract, and *the right of renunciation at any time arises*. (Italics added.)

In *Garmon v. Henderson*, 95 Atl., 409, 413, the court declared:

The authorities all agree that the unchastity of a woman before or pending a promise of marriage, if unknown, and if the promise be not renewed after knowledge, legally justifies a man in the breach of any promise. *The presumed chastity of the woman is one of the essential elements of a contract for marriage*. A man may assume that the woman he promises to marry is chaste, and if he enters upon an engagement upon that assumption, and afterwards discovers that she has been unchaste, he will not be bound by his promise. (*Berry v. Bakeman*, 44 Me., 164; *Snowman v. Wardwell*, 32 Me., 275; *Foster v. Hanchett*, 68 Vt., 321, 35 A 316, 54 Am. St. Rep., 886; *McKane v. Howard*, 202 N. Y., 181, 95 N. E. 642, Ann. Cas. 1912D, 960; *Van Houten v. Morse*, 26 L. R. A., 430). (Italics added.)

In *Von Storch v. Griffin*, 77 Pa. St., 504, 506, the Supreme Court of Pennsylvania reversed a judgment for the plaintiff in a breach of promise action, on the ground of error in the trial court's too-indulgent instructions to the jury as to her prior unchastity, and said:

The relation of which this contract was designed to be the beginning, would, if consummated, have affected

the parties throughout their lives. It is a relation on which the most important of the rights of property—the whole happiness and prosperity of families—social order and social morals—the whole structure of our civilization, indeed, finally rest. A man has a right to require that his wife shall come to him with an unstained name. If he is inveigled into an engagement by a harlot, he is the victim of a sheer, bald fraud. Elaboration of a subject like this would be simple platitude. It is enough to say, that *the law will not enforce a contract of marriage in favor of a party to it who is not fit to be married at all.* A man is not bound by such a contract if, in ignorance of her true character, he has entered into it with *a woman who has earned an evil reputation by a vicious or reckless life.* (Italics added.)

In *Morgan v. Yarborough*, 5 La. Ann., 316, it was held that “a man will be excused from performance of his promise if the woman is of unchaste character, or if her general reputation is bad, even without proving that such reputation was well founded, where he has made the promise in ignorance of her reputation.”

In *Williams v. Fahn*, 119 Iowa, 746, 94 N. W. 252, the Supreme Court of Iowa observed:

The principle involved is akin to that upon which the doctrine of *implied warranty* rests. It is to be said further that the rule is not weighed down by any requirement to the effect that specific proof must be made of specific acts of unchastity. It is sufficient if the woman is shown to be of bad character at the time of the contract, and that this was unknown to the defendant. * * * *That we correctly state the rules of law applicable, surely no man will question, and there will be none to require a citation of authorities.* (Italics added.)

(b). *A man may have his marriage to a previously unchaste woman annulled, if prior to his marriage he had not been apprised of her unchastity.*—If a man marries a woman and thereafter learns of her past unchastity, he

may repudiate and have his marriage to her annulled on that account. In *Baker v. Baker*, 13 Cal., 87, 103, 106, the Supreme Court of California reversed a judgment of the trial court denying a petition for an absolute divorce, on the ground of the respondent's concealment of her pregnancy by another man at the time of her marriage to the petitioner, and directed the entry of a decree annulling the marriage. To the same effect, see also *Markham v. Herrick*, 82 Mo. App., 327; *Franke v. Franke*, 18 L. R. A., 375; *Ridgely v. Ridgely*, 79 Md., 298, 25 L. R. A., 800, 29 Atl. 597; *LeBrun v. LeBrun*, 55 Md., 496; *Erkenbach v. Erkenbach*, 96 N. Y., 456; *Carris v. Carris*, 24 N. J. Eq., 516; *Clark v. Field*, 13 Vt. 460; *True v. Ranney*, 21 N. H., 52, 53 Am. Dec., 164; *Lynch v. Lynch*, 34 R. I., 261; *Freda v. Bergman*, 77 N. J. Eq., 46; *Martin v. Martin*, 46 S. E., 120; *Heflinger v. Heflinger*, 118 S. E., 316; *McMullen v. Hoffman*, 174 U. S., 639; *Andrews v. Andrews*, 188 U. S., 14.

In *Gross v. Hochstim*, 130 N. Y. S., 315, it was held that a woman's indiscretions of a nature *less serious than would be required to warrant the granting of a divorce may justify the refusal of a marriage*; and in *Barrett v. VanderMeulen*, 264 Ky., 441, 94 S. W. (2), 983, it was held that "If such misconduct *after marriage* is sufficient in law to justify a divorce, *a fortiori* it is a sufficient justification for not marrying".

(c). *The bearing by a woman of an illegitimate child, if not disclosed to a man at the time of his promise to marry her, sufficiently establishes her prior unchastity to constitute a complete defense to a breach-of-promise action against him.*—A showing that the plaintiff in a breach of promise action had given birth to an illegitimate child is sufficient to warrant a finding that she was unchaste. (*Clark v. Phillips*, 12 Ky. Op. 20, cited in 9 C. J., 363, and approved in *Longmuir v. Ashby*, 172 Atl., 372); and if the fact of such illegitimate birth were unknown to the defendant at the time of his alleged promise to have married the plaintiff, her unchastity thereby established is a good and

sufficient defense to her action against him. (*Denslow v. Van Horn*, 16 Iowa, 476.)

In *Bell v. Eaton*, 28 Ind., 468, 92 Am. Dec., 329, the defendant in his answer alleged that, after making the admitted promise he had learned that the plaintiff, prior to his acquaintance with her, had been delivered of a bastard child; and he thereupon demanded judgment. An order of the trial court sustaining a demurrer to this allegation was overruled, on the ground that, "if through the fraudulent concealment of the appellee he was kept in ignorance of the facts charged, it was a good defense to the action."

To the same effect also were the decisions in *Woodward v. Bellamy*, 2 Root, 354; *Berry v. Bakeman*, 44 Maine, 164; *Capehart v. Carradine*, 4 Strob., 42; *Goodall v. Thurman*, 1 Head, 209; *Morgan v. Yarborough*, 5 La. Ann., 316; *Butler v. Eschleman*, 18 Ill., 44; *Burnett v. Simpkins*, 24 Ill., 264; *Willard v. Stone*, 17 Am. Dec., 496.

In *Bench v. Merrick*, 1 Carr. & Kir., 463, 174 Eng. Rep., 893, the promise alleged in the case was proved, and a judgment on that issue was entered for the plaintiff. It further appeared, however, that, nearly twelve years prior to the defendant's promise, the plaintiff had given birth to an illegitimate child; and a verdict was thereupon entered for the defendant, on the Court's instruction that:

If a man enters into a promise of marriage in ignorance of the fact that the woman has had an illegitimate child, and discovers that before the marriage, and on that ground declines entering into the marriage, he has a right to do so, although the transaction as to the child may have taken place at a distance of eight or ten or more years ago, *and the conduct of the woman may have been since perfectly correct; * * * If he did not know it, however great a severity it may be on a woman to rake up a transaction of bygone times, * * * the defendant will be entitled to the verdict.* (Italics added.)

In *Foster v. Hanchett*, 68 Vermont, 319, 35 Atl., 316, the defendant in a breach of promise action offered testimony

tending to show that the plaintiff was of "loose and immodest character"; but the trial court limited the testimony to the mitigation of damages, and denied it any effect as a defense. The Supreme Court reversed the judgment in the plaintiff's favor, on the ground that:

Here the word "loose" is used in the sense of "unchaste," for the defendant claimed that the plaintiff had had a child by another man. The doctrine of this case is adopted everywhere. (*Capehart v. Carradine*, 4 Strob., 42; *Von Storch v. Griffin*, 77 Pa. St., 504; *Berry v. Bakeman*, 44 Me., 164; *Espy v. Jones*, 37 Ala., 379; *Burnham v. Cornwell*, 63 Am. Dec., 543.)

(d). *The defense provided by the record of a woman's undisclosed unchastity, may be availed of by the defendant in a breach-of-promise action, even though he may have breached his promise for some other reason, and may not have learned of her unchastity until after the filing of her suit.*—The Appellee's attorney, in his Memorandum in support of his motion to strike the amended answer (App. 42-43), urged the asserted insufficiency of the Fifth defense (App. 12-14), on the ground that the Appellant had not known of the Appellee's unchastity at the time of his alleged breach of promise, and therefore could not have been impelled thereto by said misconduct. In any case of the plaintiff's proved unchastity, however, if unknown to the defendant at the time of his alleged promise, the time of his first discovery of the facts is immaterial; and the defense thereby constituted may be availed of by him at any time before the entry of a judgment against him.

In 8 Am. Jur., Par. 24, it is held to be "*immaterial that the want of chastity is not known to the defendant until after the commencement of an action.*" In *Colburn v. Marble*, 196 Mass., 376, 82 N. E., 28, it was held that proof of the plaintiff's unchastity *before the defendant's promise*, of which he had not learned *until after she had filed her suit against him*, was a complete defense to her action; and in *Barrett v. Vander-Meulen*, 264 Ky., 441, 94 S. W. (2) 983,

supra, it was held that “*this is so even if the defendant did not know of plaintiff’s unchastity until after the action*” was brought.

The proposition that a woman’s prior unchastity, if unknown to the defendant at the time of his engagement to her, is a complete and unanswerable defense to her suit against him for a breach of his promise of marriage, was unreservedly reaffirmed also in *Irving v. Greenwood*, 1 Carr. & Payne 350; *Wharton v. Lewis*, 1 Carr. & Payne 529; *Brisack v. King*, 191 N. Y. S., 477, 199 App. Div., 213; *Smith v. Hall*, (Conn.) 38 Atl., 386; *Keegan v. Sage*, 25 N. Y. S., 78; *Lecky v. Bloser*, 24 Pa., 401; *Young v. Murphy*, 3 Bing. (N. Y.), 54; *Rich v. Mayer*, 7 N. Y. S., 69; *Walker v. Metcalf*, 209 Pa. St. 373, 58 Atl., 687; *Lewis v. Tapman*, 45 Atl. 459; *Smith v. Smith*, 50 N. E., 933; *Kantzler v. Grant*, 2 Ill. App., 236; *Doubet v. Kirkman*, 15 Ill. App., 622; *La Porte v. Wallace*, 89 Ill. App., 517; *McKee v. Nelson*, 15 Am. Dec., 384; *Guptil v. Verback*, 12 N. W., 125; *Stratton v. Dole*, 63 N. W., 875; *Harriman v. Layman*, 92 N. W., 710; *Edmonds v. Hughes*, 74 S. W., 283; *Kelley v. Highfield*, 14 Pac., 744; *Watson v. Bean*, 270 S. W., 801.

It is thereupon respectfully submitted that the Appellee’s recurrent records of unchastity, prior to her acquaintance with the Appellant, and admittedly undisclosed to him at the time of his alleged promise to have married her, provide and constitute a complete and conclusive defense to her breach-of-promise action against him.

III-4. THE APPELLANT IS LEGALLY ENTITLED TO PLEAD AND PROVE THE FACTS CONCERNING THE APPELLEE'S "VEXATIOUS SUIT" AGAINST THE FATHER OF HER BASTARD CHILD, ALLEGING PROMISES ON DATES WHEN SHE HAD KNOWN THAT HE WAS LEGALLY MARRIED TO ANOTHER WOMAN, AS TENDING ALSO TO BELIE HER PRETENSE OF AN ACTIONABLE PROMISE OF MARRIAGE BY THE APPELLANT.

The Appellee, in her complaint against the father of her bastard child, for his alleged breach of two distinct promises of marriage, fixed the dates of said promises as June 15, 1937, and February 28, 1938, respectively (App. 36-38). The wife of said respondent filed her first bill of complaint against him, for a divorce from bed and board, on August 2, 1937 (App. 28, 29); and she filed her amended bill for an absolute divorce (App. 28-31), naming the Appellee as co-respondent, on or about August 27, 1937. Her final decree of divorce from the respondent (App. 31-33) was entered by the City Circuit Court of Richmond, Virginia, on November 30, 1937; neither of the parties being permitted thereby to remarry within six months thereafter, or prior to May 30, 1938.

If the respondent, therefore, had in fact agreed on June 15, 1937, to have married the Appellee, she then well knew that he was married to and undivorced from his lawfully-wedded wife and the mother of his infant son. His promise if any on said date, therefore, was in contravention of public policy, illegal, void and unenforceable in the Appellee's action against him, or in any other legal or judicial proceeding.

In *Wilson v. Carnley*, 1 K. B., 729, 14 Ann. Cas., 157, the plaintiff knew that the defendant, at the time of the alleged promise, was married to another woman. The wife died; the husband breached his promise; and the plaintiff sued. He defended that his promise was against public policy, invalid and unenforceable; but the trial court declined to dis-

miss the bill (23 Times L. R., 578). The action went to trial; the plaintiff recovered a compensatory judgment; and the defendant appealed. The Court of King's Bench, in reversing the judgment, said:

I find it impossible to realize the position of man who, in the lifetime of his wife, deliberately affiances himself to another woman, or to understand how, in such a case, he can reconcile his duty to his wife with the relation of an engaged suiter to another. Whatever may or may not be ground for calling in aid the doctrine of law by which contracts are avoided as being against public policy, it is quite clear that contracts which are *contra bonos mores*, as conducive to immorality or crime, come within that doctrine * * * These considerations alone are quite sufficient to show that it would be contrary to public policy to allow an action to be maintained upon such a promise.

(See also the citations to the same general effect under Caption III-2, *supra*.)

As to the respondent's alleged promise, if any, on February 28, 1938, the probationary period after which he might legally have remarried had nearly three months yet to run. In the eyes of the law, therefore, he was still married to his wife; and his alleged renewal promise to the Appellee was still unenforceable in any legal action against him. As held in *Noice v. Brown*, 20 Am. Rep., 388, Affirmed in 23 Am. Rep., 213:

The case thus presented is that the defendant, being a married man, and living apart from his wife, and in expectation of a divorce from her by force of a bill then pending, promised the plaintiff to marry her in a reasonable time after such divorce should have been obtained. I can not see the faintest semblance of legality in the promise here laid. *It is wholly fallacious to suppose that a contract is not illegitimate if the act agreed to be done would not be illegal at the time of its contemplated performance. Such is not the law. A contract is totally void if, when it is made, it is opposed to morality or public policy. * * ** Such contracts are highly impolitic and highly scandalous, and are therefore illegal. (Italics added.)

In *Vnuk v. Patterson*, 247 P., 766, a judgment for the plaintiff was reversed on the ground that a promise of marriage, made to the knowledge of both parties after the entry of a decree of divorce against one of them, but *before the expiration of the probationary period fixed by the laws of the State*, is void *ab initio*.

In *Davis v. Pryor*, 112 Fed., 274, 277, the Circuit Court of Appeals for the Eighth Circuit reversed a judgment for the plaintiff (58 S. W., 660), on the ground that she had known at the time of the alleged promise that the defendant was the *common-law husband* of another woman, and that:

She (plaintiff) herself, at best, recklessly entered into a supposed contract with defendant with full knowledge of all facts which avoided it *ab initio*. Her general character and conduct, as disclosed by the record, and *especially her blind indifference to the happiness and welfare of defendant's wife * * * does not commend her case to any other than the closest scrutiny with respect to her exact legal rights. * * ** If made, it (the promise) was "more honored in the breach than in the observance." (Italics added.)

(See also *Edelbaum v. Lustig*, 250 N. Y. S., 561; *Swein-hart v. Bamberger*, 2 N. Y. S. (2), 130, 166 Misc. Cas., 256; 9 C. J., 330, Note 82-b.)

If the Appellee, in her aforesaid suit against the father of her bastard child, had been properly advised by her attorneys, as to the illegality and the legal unenforceability of either of his alleged promises of marriage to her, and their professional standing indubitably warrants an assumption that they themselves were fully informed as to the law of the case, and had properly so advised their client, the conclusion is inescapable that she then knew that she had no actionable claim against the defendant; and that her filing of her suit against him had been either inspired by the "fury of a woman scorned," or induced by a definite purpose to have blackmailed him, by threats of unsavory publicity prejudicial to his official position in

the Administration of the State Government of Virginia, and of thereby extorting from him a sum of money which he had been either unable or unwilling to give to her, as compensation for the physical discomfort and the mental anguish presumably attending her delivery of his bastard child.

Her voluntary dismissal of her suit, upon his submission to an order of the Juvenile Court requiring him to contribute \$30.32 per month to the child's support and maintenance (App. 35-36), betokened her realization that she had had no justiciable claim against him *in her own behalf*, and that her breach of promise action against him had been merely "vexatious," as described in the foregoing caption.

It is sinisterly significant, moreover, that the Appellee could have been so deeply in love with another man that she had sued him for the damages which she had suffered when he refused to marry her; and *that exactly two years and four days later, and within less than nineteen months after she had voluntarily dismissed her suit against him*, she had made herself so attractive to the Appellant that he had promised to marry her, and had permitted herself to become so completely overwhelmed by her devotion to him that his subsequent refusal to marry her had damaged her to the extent of half a million dollars.

Clearly, therefore, the Appellant is now entitled to plead and prove the revealing facts in connection with the Appellee's aforementioned suit, as exemplifying the processes of her crafty and ruthless mind, in having planned and plotted the diabolical scheme whereby she and her successively confederated counsel have sought for nearly four years to have extorted from the Appellant an unconscionable sum of money, to which she has known, and they at least have been chargeable with knowledge, that she has had and has no vestige of a legal or properly justiciable claim.

The Order of Mr. Justice Letts, therefore, in so far as it may have sought to divest the Appellant of his right to

plead and prove all the sordid facts in connection with the Appellee's aforementioned suit, is null and void, and should be set aside by this Honorable Court.

III-5. THE APPELLANT IS LEGALLY ENTITLED TO PLEAD AND PROVE THE APPELLEE'S RECORD OF UNCHASTITY, AS DEFENSIVELY TENDING TO JUSTIFY HER ALLEGED CHARACTERIZATION AS A PROSTITUTE.

The Order here under review (App. 44) required the Appellant to strike from the NINTH defense in his Amended Answer all reference to the fact therein alleged that the Appellee, for more than fifteen years preceding the filing of said Answer, had been a "lewd, lascivious, unchaste and immoral woman, as more particularly set forth in the FIFTH defense", which latter also had been ordered stricken from the record (App. 18).

The Appellant had denied categorically in his EIGHTH defense, and he now unreservedly reaffirms said denial, that he has ever referred to the Appellee as a prostitute, howsoever well that appellation may have been justified by the record of her past and shameless iniquities.

It is unthinkable, moreover, that any jury in the District Court would ever accord any serious consideration to the idle repetition by an irresponsible gossip-monger, of a purported conversation had by him by telephone with the Appellant, or with any other person whom he did not know, had never seen and would not have recognized if he had seen him; yet the Appellee's exactions from the Appellant of damages in the fantastic sum of \$200,000.00 are based in part upon her false and diaphanous allegations to that effect (App. 4).

The Appellant has compiled a voluminous digest of the precedential decisions comprehending the Law of Slander and Defamation; and he refrains from including it herein only because of the obvious need for an abridgement hereof within limits which may not unduly impose upon the

patience of this Honorable Court. It is respectfully submitted as an axiomatic principle, however, that the law has immemorially and distinctly recognized the truth of any actionable accusation or characterization as a complete defense to any action based thereon.

The Appellant, therefore, is legally entitled to have alleged in his Amended Answer and thereupon to prove at the proper time that, even if he had called the Appellee a prostitute, as alleged in her Amended Complaint, she still would have had no actionable claim against him for damages, because of the demonstrable *truth of her at least occasional practice of the commonly-accredited habitudes of prostitutes.*

She only, of course, can authoritatively attest to the underlying reasons impelling her provably recurrent meanderings along the dark and slippery by-ways of illicit relations, but her untruthful insistence referred to in the Appellant's proposed ELEVENTH defense (App. 41) that she had lived with him as his "common-law wife", coupled with the fact that she is now suing him for \$500,000.00 for an alleged breach of a purely fabricated promise to have married her, clearly justifies the conclusion that she had been, at least in that pretended relationship, quite willing to and had actively sought to have bartered or sold her imaginary charms and intimate favors for cash or money's worth. The Appellant's available proof of her frequently-indulged predilections along that line would brand the Appellee a prostitute, and would provide and constitute a complete defense to the charge in her Amended Complaint that he had so classified her, if he had ever done so, as he hereby reasserts he never did.

The authorities cited under Caption III-3, *supra*, with reference to the defensive value of the Appellant's record of the Appellee's unchastity, and the arguments based thereupon, are equally applicable hereunder, and attention is respectfully directed thereto, incidentally to the present consideration of the legality or the illegality of the immediate phase of the Order in question.

It is thereupon respectfully submitted that the Appellant was clearly justified in having included in his NINTH defense the hereinabove cited excerpt from his FIFTH defense, which Mr. Justice Letts has ordered stricken from the record; and the Order herein complained of, in so far as it may have sought to divest the Appellant of his legal right to plead and prove the Appellee's record of unchastity, in defense of her impending charge of defamation, is arbitrary and legally unwarranted, and should be annulled by this Honorable Court.

III-6. THE APPELLANT IS LEGALLY ENTITLED TO PLEAD AND PROVE THE APPELLEE'S ACCEPTANCE OF HIS CHECK FOR \$100.00, IN FULL AND FINAL SETTLEMENT, ACCORD AND SATISFACTION OF HER CLAIMS AGAINST HIM.

The Order of Mr. Justice Letts (App. 44), for reasons not disclosed thereby or by the available record, directed the Appellant to delete from his Amended Answer the entirety of his TENTH defense, wherein he had alleged his payment to the Appellee of \$100.00, *on November 13, 1940*, in full and final settlement, accord and satisfaction of all her purported claims against him.

The Appellee, in paragraph 3 of her amended complaint (App. 1), alleged that the Appellant had stated to her "*in November, 1940*" that he would not marry her; and the Appellant, in the second paragraphs of the SECOND defense in both his original and amended Answers (App. 5, 9), admitted that allegation, and fixed the date of his said termination of any illusions which theretofore she might have indulged in the matter, as having occurred on *November 5, 1940*.

For reasons which need not now be considered, the Appellee thereafter moved to change the date of the Appellant's breach of his purported promise, as alleged in her amended complaint, to *December, 1940*; but, howsoever their discussion of November 5, 1940, may have been or may

be interpreted, it marked the end of even the pretense of friendliness which for more than three months then had characterized the relations between them.

Upon the Appellant's intended proof of the latter fact, it will be readily apparent that he would have had no reason to give the Appellee anything of value after *November 5, 1940*, except in consideration of her then agreed acceptance thereof as his *final gift or payment to her on every account and in every circumstance*; or in other words upon her unconditional if constructive release of all her theretofore asserted claims against him. He is prepared, of course, to assume the burden of proving the factual circumstances in which the payment in question was made; but he would not be permitted so to do unless the Order requiring him to delete the TENTH defense from his Amended Answer were itself annulled and set aside.

No citation of authorities should be required to establish the premise that any understanding upon which the parties thereto have agreed may be terminated by them by mutual agreement; but it may be noted that in *Torrey v. Hardy*, 196 S. W., 1100, a payment of \$400.00 by a man to a woman whom he had promised to marry, to whom he thereafter expressed his willingness to give the money, if she would release him from his promise, and who so retained it, but afterwards sued him for a breach of promise of marriage, was held to have constituted a sufficient consideration for the release thereby accomplished; it being held by the Court that:

Having accepted and retained the \$400.00 paid by defendant under the above circumstances, the plaintiff, under the authorities in this State, as well as *upon the plainest principles of justice*, is estopped from maintaining this action. (*Wood v. Truscoe*, 178 S. W., 201; *Tower v. Compton*, 91 S. W., 104; *Fox v. Windes*, 38 S. W., 323; *MacFarland v. Railway*, 28 S. W., 590; *Beavers v. Bank*, 163 S. W., 529.) (Italics added)

In *King v. Goode*, 37 S. W. (2), 869, it was held that:

An agreement to marry, like any other contract or agreement, may be dissolved or rescinded by the mutual consent of the parties; and, where one party seeks to repudiate the promise, *the consent of the other party may be inferred from circumstances indicating an evident intention to abandon the contract.* (Italics added.) (Black on Rescission & Cancellation, Vol. 2, 937; 9 C. J., 331; *Dean v. Skiff*, 128 Mass., 174; *Kellett v. Robie*, 99 Wis., 303, 74 N.W., 781; *Mabin v. Webster*, 129 Ind., 430, 28 N. E., 863, 28 Am. St. Rep., 199; *Shellenberger v. Blake*, 67 Ind., 75; *Brown v. Gunderson*, 143 N. W., 795; and *Sund v. Paul*, 62 P. (2), 803).

It is thereupon submitted that the Order in question, in so far as it may have sought to divest the Appellant of his right to plead and prove the facts set forth in his TENTH defense, which he contends provide and constitute a complete and conclusive defense to the Appellee's claims against him, should be set aside by this Honorable Court as arbitrary, illegal and void.

IV. THE ORDER IN QUESTION ILLEGALLY DENIED THE APPELLANT'S RIGHT TO PLEAD IN HIS PROPOSED ELEVENTH DEFENSE THE ADMITTED FACT THAT THE APPELLEE HAD LONG AND CONSISTENTLY REGARDED HERSELF AS HIS "COMMON-LAW WIFE" AND NOT HIS MERE FIANCEE, AS BELYING HER PRETENSION THAT HE HAD BREACHED AN ALLEGED PROMISE TO MARRY HER.

Mr. Justice Letts, in his Order here under review, denied the Appellant's Motion for leave to add an ELEVENTH defense to his Amended Answer, assailing the asserted right of the Appellee to have sued him for a breach of his alleged promise to have made her his *legal wife*, in the face of her repeated assertions to him that she *had become and was his "common-law wife"* (App. 40-41).

The Appellee has never "lived with" the Appellant, as his common-law wife or otherwise; and her heretofore repeated assertions to that effect have been deliberate parts and parcels of a carefully-considered plot to have compelled him to support her through the remainder of her lifetime in a style to which she has never been accustomed.

It is the Appellant's intention, however to prove at the proper time that the Appellee had never considered an occasion for or a possibility of her assertion of a breach-of-promise claim against him, until after her initial interview with her first attorneys in the case; that she had until then had in mind a scheme to have sued the Appellant as her putative "common-law husband", for a divorce and munificent alimony; and that it was her aforesaid attorneys who first suggested to her the to-them-very-obvious untenability of her pretense of a common-law relationship with the Appellant, and the preferable expedient of a suit against him for a pretended breach of a purely fabricated promise to have married her.

In any event, and regardless of whether or not the Appellant may succeed in his intended efforts to identify the Appellee's impending action against him as a concept of her quondam attorneys and not her own, the Appellant assuredly is entitled to plead and prove the facts set forth in his proposed ELEVENTH defense, for whatever if anything they may be worth, and particularly as negating or belying the Appellee's pretense that he had ever promised to marry her. The Order of Mr. Justice Letts, therefore, in so far as he may thereby have intended to divest the Appellant of his rights in the aforementioned respects, is arbitrary and legally unwarranted and should be annulled.

V. THE ORDER IN QUESTION ILLEGALLY DENIED THE APPELLANT'S RIGHT TO PLEAD AND PROVE ALL THE DEFENSES ORDERED STRICKEN FROM HIS AMENDED ANSWER, IN MITIGATION OF ANY DAMAGES TO WHICH A BIASED JURY MIGHT DEEM THE APPELLEE TO BE ENTITLED.

If the Orders herein complained of be annulled, as prayed by the Appellant, the thereupon attendant reinstatement of his Amended Answer, undespoiled of the seven affirmative defenses therein set forth, should enable him successfully to resist any and every assault which may be directed by the Appellee against him.

The Appellant, however, is not unmindful of an ever-present possibility that a jury of inherently honest men and women, sworn to a fair and just fulfillment of their duty, may yet be swayed by their sympathies in favor of any woman, howsoever evil she may be, especially if her sins at long last, as in the instant case, are about to overtake her.

In a superabundance of precaution, therefore, in the event of any such contingency, it may be important to the Appellant to preserve his legal rights to plead and prove all the facts recited in his Amended Answer, not only as substantive defenses, but in mitigation of any damages which a conceivably prejudiced jury, inclining in the Appellee's favor and against the Appellant, might deem her in all the circumstances to be entitled.

In *Gerlinger v. Frank*, 145 P., 1069, the court observed:

A most corrupt and unworthy person may make a fair appearance * * * upon a witness stand; and it would be a harsh rule that would exclude the opposing party from revealing * * * the actual value of the declarations of such a witness. Besides all this, the plaintiff was claiming damages on account of being greatly humiliated, suffering great mental pain and anguish, and having her affections deeply injured. *It is a matter of common sense that a pure-minded, virtuous*

woman will suffer greater damage over the disappointment of her affections than a common bawd would experience in the refusal of her paramour to marry her.

* * * Any testimony, therefore, throwing light upon the person supposed to be damaged was pertinent to this general issue. *That cannot be injured which is already corrupt; that cannot be spoiled which has been destroyed; and that cannot be damaged which is already dilapidated beyond repair.* The antithesis between a pure, good, and virtuous woman and a blasé demirep is as marked as the difference between the songs of the ransomed and the wail of the damned.

The Appellant is justly and legally entitled, therefore, to plead and prove, in mitigation of potential damages as well as in furtherance of his substantive defense, every sinister shadow and every sordid scar on the Appellee's slimy and libidinous past, in exemplification of her ruthless disregard of the feelings of every living creature except herself, including babies made half-orphans by her insatiate lust, of her vengefully demoniac urge to annihilate the reputation and irretrievably besmirch the character of every hapless soul who has declined to yield to her imperious will, or who otherwise may have incurred her displeasure, and of her greed for unearned material wealth, at any cost to others or to herself in honor, decency and self-respect. It may be of vital importance to the Appellant's defense, therefore, in any proceeding in which the Appellee may appear before a jury, that he be enabled to strip her of her thin veneer of simulated gentleness, respectability and outraged innocence, and permit her to exhibit herself before the Court and jury as the seasoned craven, soulless Jezebel she is.

The Order in question, therefore, in so far as it may have been designed to abridge the Appellant's rights in the aforementioned respects, should be set aside as null and void.

VI. THE REQUIREMENT IN THE ORDER OF MR. JUSTICE GOLDSBOROUGH, THAT THE APPELLANT COMPLY IN TERMS WITH THE ORDER OF MR. JUSTICE LETTS, DIRECTING AN EMASCULATION OF THE APPELLANT'S AMENDED ANSWER, SHOULD BE ANNULLED, AS ARBITRARY AND VOID IN ITS INVOLVEMENT OF JUDICIAL DETERMINATIONS OF SUBSTANTIVE DEFENSIVE ISSUES NOT SUBMITTED TO NOR LEGALLY COGNIZABLE BY THE MOTIONS COURT ON THE APPELLEE'S MOTION FOR A JUDGMENT BY DEFAULT AGAINST THE APPELLANT.

The Appellee's Motion for a Judgment by Default (App. 45) against the Appellant, for his omission to have refiled within ten days an emasculated Amended Answer, gave no intimation of an expectation of any action by the Motions Court except the granting or a denial of said Motion. The Appellee's supporting Memorandum of Points and Authorities (App. 45-46) contained no reference to any of the legal issues involved in the antecedent Order of Mr. Justice Letts. No argument was offered before the Motions Court as to any of those issues, either by the Appellee's counsel or by the Appellant in his own behalf; and it is clearly apparent from the terms and intendments of the affirmatory Order that the Motions Justice had not pre-informed himself as to the significance or the consequential implications of any of the determinative legal issues involved in the antecedent Order, or as to the legal justification, if any, of the prior adjudications of said issues. It was therefore clearly inconsiderate and improper for Mr. Justice Goldsborough to have volunteered a virtual reaffirmance of the pronouncements of Mr. Justice Letts in his Order herein complained of.

The prescription by Mr. Justice Goldsborough, in the concluding portion of his Order, moreover, that the Appellant's required refile of his Amended Answer should not prejudice his rights "to pursue and prosecute his application for

the allowance of a special appeal" (App. 47), bespoke the Court's preapprisement of the then impendency of said application. Considerations, therefore, of the usually-observed judicial amenities, and especially of the deference customarily accorded by trial courts to appellate tribunals, might have justified a postponement by the Motions Court of the effective date of the Appellant's required compliance with the Order from which his application for an appeal was then under advisement, until such time as said application might conveniently have been acted upon by this Honorable Court.

Except for the timely and gracious action of this Court, however, in granting the Appellant's application for an appeal from the Order of Mr. Justice Letts, the Appellant would have been confronted with a dilemma wherein he must have either filed his emasculated Answer, as required by the Order of Mr. Justice Goldsborough, and thereby rendered moot the issues involved in his impending application for an appeal, or declined to comply with said Order, and thereby have subjected himself to a possible and not unlikely citation for an unintended but perhaps imputed contempt of an Order of a Court before the bar of which he has been a deferential and respectful member for nearly thirty-seven years.

It is unthinkable that any reputable citizen should have been deliberately so embarrassed in his efforts to defend himself against the ruthless aggressions of a notoriously and viciously immoral woman, in an action verily reeking with the stench of blackmail; and, in order to maintain the perfect balance of the Scales of Justice, no less than to preserve the Appellant's rights in the aforementioned respects, the Order of Mr. Justice Goldsborough, saving only his denial therein of the Appellee's Motion for a Judgment by Default against the Appellant, should be overruled, annulled and set at naught.

CONCLUSION.

Upon consideration whereof, the Appellant respectfully submits that the precedential authorities hereinabove cited, and his arguments severally based thereupon, should have dispelled from the mind of this Honorable Court any possible doubt of first impression as to the conclusiveness and legal sufficiency of every defense required by the Orders herein complained of to have been stricken from the Amended Answer.

The Appellant further respectfully submits that none of the defenses so interdicted by the Motions Court is legally objectionable as "pleading evidence"; but the Appellant reaffirms his readiness, with the Court's approval, to revise or amend the terminology of any said defense, in exact conformity with any constructive suggestion which may be offered by the Appellee's attorney, provided only that the Appellant be not thereby divested of his legal right to prove any and every fact particularized or reasonably implied in the textual presentation of said defenses.

The appellant regrets the unhappy occasion for his having so prolonged the foregoing substance of this brief; but in extenuation of its perhaps unseemly protraction, it may be recalled that it concerns a purely "vexatious suit" against the Appellant for \$700,000.00, which has been pending in the District Court for nearly three years, and which throughout that term, and for nearly a year preceding the filing of the suit, has preoccupied the Appellant's attention, to the practical exclusion of every other interest in life.

The action, moreover, is one which might have been filed by any other unscrupulous woman against any hapless victim of her cupidity, provided only she may have convinced her lawyers of his pecuniary worthiness of their persecution.

It may be observed also that the Appellant has personally reviewed and compiled a typewritten digest of nearly seven hundred decisions in breach-of-promise, slander and

related cases, comprising every so-identified and accessible opinion of the courts of England as well as in the United States. The authorities hereinabove enumerated, therefore, represent but a small proportion of the cases which might have been cited in support of the specified legal principles therein accumulatively reaffirmed.

The Appellant especially bespeaks his humble apologies for having perforce obtruded upon the attention of the respected Justices who constitute this Honorable Court a subject so naturally revolting to any self-respecting mind as the putrid action in which the Orders herein assailed were entered, which was neither initiated nor invited by the Appellant, and his only inducing contribution to which was his refusal to be blackmailed by a disreputable woman, of whose past derelictions he had not then been apprised, and whom he had befriended because—and only because—of his gratitude for her skillful professional ministrations to his honored Mother in her last illness.

If the Appellant has transgressed the proprieties traditionally observed in such situations, therefore, in his hereinabove unexpurgated characterizations of the Appellee, he humbly trusts that the Justices to whose attention such animadversions may come will make due allowance for his intemperance, in a realization that the persecutions to which he has been subjected by the Appellee and her successive attorneys through the past forty months have so seriously and permanently impaired his physical health, as well as his power of intellectual recuperation, as to have left him scant hope of any enjoyment of the peace and serenity of mind to which a lifetime of industrious and forthright effort and self-denials might seem to have entitled him.

Respectfully submitted,

OTIS BEALL KENT,
Appellant, in his own behalf.
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BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

January Term, 1944

No. 8662

OTIS BEALL KENT, *Appellant*
vs.
MARGARET BUCHANAN, *Appellee*

No. 8679

OTIS BEALL KENT, *Appellant*
vs.
MARGARET BUCHANAN, *Appellee*

SPECIAL APPEALS FROM INTERLOCUTORY ORDERS OF THE
DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

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BRIEF FOR APPELLEE

Preliminary.

The above numbered cases are special appeals in an action for damages for a breach of promise of marriage and for slander, instituted in the United States District Court for the District of Columbia by the appellee, Margaret Buchanan, (hereinafter referred to as plaintiff) against Otis Beall Kent, appellant, (hereinafter referred to as defendant) from interlocutory orders entered by the court below therein. That said special appeals were consolidat-

ed by an order of this Court, entered January 27, 1944, and are presented under a consolidated record.

Statement of Matters Involved.

1. On December 7, 1943, the District Court of the United States for the District of Columbia entered an order granting motion to strike defenses numbered "third," "fourth," "fifth," "sixth" and "tenth," and that part of defense numbered "ninth," which refers to and incorporates defense number "fifth," as a part thereof, contained in defendant's answer, (App. 44), and said order granting said motion to strike also denied the motion of the defendant (App. 40) to add proposed supplemental defense number "eleventh" (App. 41) to the defendant's said amended answer, upon the grounds that said defenses were legally insufficient, under the facts disclosed in defendant's original answer and amended answer to the amended complaint, and upon the further grounds that said defenses constituted the pleading of evidence (Defendant's amended answer App. 9 to 19). The order gave the defendant "ten days leave within which to refile said amended answer with said numbered defenses not included therein."

2. The defendant did not refile said amended answer, within the ten days leave given him, as provided by said order dated December 7, 1943, entered by Mr. Justice Letts, but on December 11, 1943, said defendant filed a notice of intention to apply for allowance of a special appeal from the order dated December 7, 1943, without, however, having, before or after the filing of said notice, applied for a stay of the proceedings in the court below.

3. On December 31, 1943, the defendant having failed to apply in the court below for a stay of the proceedings in the court below, as is required by Rule 11(c) of the General Rules of this Court and Rule 55(a) and Rule 55(2) of the

Rules of Civil Procedure for the District Courts of the United States, the plaintiff filed a Motion for Judgment by default for failure to answer. (App. 45.)

4. On January 17, 1944, an order was entered by Mr. Justice Goldsborough, denying the plaintiff's motion for a judgment by default for failure to answer, but requiring the defendant to refile, in accordance with the order previously entered by the court below on December 7, 1943, the amended answer filed by said defendant, and giving said defendant an additional ten days leave within which to refile said amended answer, and providing that the refiling of said amended answer would not prejudice the rights of said defendant to pursue and prosecute his application for the allowance of a special appeal to this Court, then pending, and providing further that the refiling of said amended answer would not stay other proceedings in said action in the court below. (App. 46-47.)

5. On Petitions for special appeals from the aforesaid orders, namely, the order of Mr. Justice F. Dickinson Letts, entered December 7, 1943, and the order of Mr. Justice T. Allen Goldsborough entered January 17, 1944, in the same cause in the court below, this Court, on January 27, 1944, entered an order allowing special appeals from said orders of the court below, and said order entered by this Court allowing said special appeals, without any application for a stay of the proceedings having been made by the defendant in the court below, but upon a petition for a stay of the proceedings in said cause filed by the defendant in this Court, also ordered that further proceedings in said cause in the court below be stayed pending the disposition of said special appeals, and further ordered that said appeals be consolidated and that a consolidated record be prepared in conformity with Rule 12(c) of this Court. (Order — App. 48-49).

Argument and Authorities.

The sole question to be decided by this Court is whether the several defenses, namely, defenses numbered, "third," "fourth," "fifth," "sixth" and "tenth" contained in the defendant's amended answer and proposed defense number "eleventh" submitted by the defendant's motion to add supplemental defense number "eleventh" to defendant's amended answer, are good defenses,—are they legally sufficient, or are they bad defenses,—are they legally insufficient. We maintain that the said defenses are all bad defenses and are legally insufficient and amount to mere pleading of evidence and that under the law the pleading of evidence is not permitted, and, that, therefore, the court below committed no error in ruling out said defenses. The points and authorities in support of this position taken by us will be considered and discussed herein, under each of the several defenses in question, in their numerical order.

1. The court below committed no error in striking defense number "third" from answer to amended complaint.

Defense numbered "Third" (App. 10-11) attacks the validity of the Virginia divorce decree secured by the plaintiff. Obviously the defendant at the time the plaintiff secured the decree in the Virginia divorce suit had no interest whatsoever in said Virginia divorce proceedings and was a total stranger to said suit, and no rights of his, either legal or equitable, were involved therein. In order for the defendant to collaterally attack the Virginia divorce decree, and before defense numbered "Third" can constitute a good defense in this connection, it is necessary to plead facts showing that first, some legal or equitable right of his was invaded by the decree, or second, that said decree was void for lack of jurisdiction. For if said decree was only voidable, it can be set aside only at the instance of a party whose rights have been invaded thereby. The defendant's

interest, if any, is that he desires to show that at the time of the alleged promise of marriage, the plaintiff had no legal capacity to enter into such a contract. The facts pleaded by the defendant in his "Third" defense do not show that any legal or equitable right of his was invaded by the Virginia decree, nor that said decree is void for lack of jurisdiction on the part of the Virginia court. Such allegations as that the decree "was entered by a court entirely devoid of jurisdiction over either of the parties or over the subject matter," or that said decree "was obtained by the plaintiff through her deliberate fraud and collusion with her aforesaid husband," used by the defendant in his "Third" defense are mere conclusions on his part, and do not allege sufficient facts to show why the court had no jurisdiction over either of the parties or over the subject matter, or what constituted the fraud and collusion on the part of the plaintiff and her then husband. Rule 9(b) of the Rules of Civil Procedure for the District Courts of the United States requires that in all averments of fraud the circumstances constituting fraud shall be stated with particularity. This the defendant has failed to do. In addition to this, Exhibits "A-1," "A-2" and "A-3," which are certified copies of the Bill of Complaint; the transcript of testimony before a Commissioner in Chancery; and of the decree, respectively, and attached to the amended answer and by reference made parts of said "Third" defense, sustain, in every respect, the validity of the divorce decree, which, we respectfully submit, having been made parts of the "Third" defense by the defendant, now, in the light of the decision rendered by the Supreme Court of the United States in *Williams vs. North Carolina*, 317 U. S. 287, bars the defendant from attacking the validity of said divorce decree and entitles the same to full faith and credit under the Constitution of the United States. In general, a decree or judgment of divorce cannot be impeached except by the

record itself, or where the lack of jurisdiction appears on the face of the record, unless it was such as left the court without jurisdiction, and the decree absolutely void as between the parties thereto. No facts have been alleged by the defendant to show that the Virginia court was without jurisdiction or that the divorce decree was absolutely void as between the plaintiff and her then husband. The certified copies of the divorce proceedings in Virginia show that the plaintiff was an actual bona fide resident of the State of Virginia, and had been domiciled in the City of Richmond for the required period, and that she gave testimony in support of the allegations of her complaint in the manner prescribed by the Virginia law, and that her defendant husband was personally served with process. In addition, the marriage was entered into in Richmond, Virginia, and the parties were and had been domiciled in Richmond, since it was performed on July 29, 1922. The Virginia court therefore had jurisdiction of the parties and of the subject matter. No facts are alleged in defense numbered "Third," by the defendant, to show that the plaintiff was not a resident of the State of Virginia and domiciled in the City of Richmond for the required period, or that the defendant was not personally served with process. Hence said defense does not constitute a good defense. Before the defendant can collaterally attack the Virginia decree, he must allege facts sufficient to show that said decree is absolutely void. An attack cannot be made by him upon it if it be merely voidable. We submit, that the defendant has not alleged sufficient facts to show that the Virginia decree is either void or voidable. An allegation of a bare conclusion is not sufficient.

Adair vs. Adair, 206 App. Div., 394, 201 N. Y. S., 398 (cited by appellant at page 14, his brief).

Williams vs. North Carolina, 317 U. S. 287, 63, S. Ct. 207.

Bennett vs. Wilson, 65 Pac. 880, 133 Cal. 379 (cited by appellant, page 21, his brief).

Saul vs. Saul, 74 App. D. C. 287.

In the case of Adair vs. Adair, 206 App. Div. 394, 201 N. Y. S., 398, cited by the defendant at page 14 of his brief, filed herein, the defendant has mistakenly stated the facts and the rulings of both the lower court and Appellate Court. In fact, he has stated the rulings of both the lower and Appellate Courts in reverse, which obviously has the reverse effect on the contention here made by the defendant under this heading. Instead of supporting the contention made by the defendant, the case actually and completely supports the contention made by us on behalf of the plaintiff that the "Third" defense asserted by the defendant in his amended answer, which was stricken by the court below, does not constitute a defense, as claimed by the defendant, to the plaintiff's breach-of-promise suit now pending against the defendant. This case (and other cases cited therein) completely explodes the defendant's entire theory on this particular question.

The facts in the Adair case show that it was an action to annul a marriage between the plaintiff and the defendant upon the ground that the plaintiff was induced to enter into the marriage by the false and fraudulent representations of the defendant that he had never been married before, whereas he had, prior to said marriage, been married to one Willie May Wiggins from whom he had been divorced; that upon discovery of the falsity of such representation and the concealment practiced by the defendant, the plaintiff left the defendant and did not cohabit with him thereafter. The plaintiff claimed to have obtained jurisdiction of the defendant by personal service of the summons and complaint upon him without the State pursuant to an order of

the court for that purpose, instead of service by publication as stated by plaintiff at page 14 of his brief herein. The defendant defaulted in appearing and the plaintiff and her mother were examined as witnesses. A decree was entered annulling the marriage. No attack was made by the defendant on the decree thus entered. The plaintiff after the entry of the decree of annulment (July 17, 1920) and on or about June 27, 1921, instituted an action for \$1,000,000.00, damages for an alleged breach of a promise of marriage against one Cornelius Vanderbilt Whitney. The defendant Whitney, through his attorneys intervened in the annulment suit and moved to vacate the decree of annulment upon the ground that the court in the annulment suit did not obtain jurisdiction of the defendant and that the decree was obtained by fraud practiced upon the court. The defendant Whitney based his claim of right to so intervene upon the fact that he had been sued by the plaintiff for breach of a promise of marriage which is the same, in theory, as the defendant here claims his right to attack the Virginia divorce decree in question in the case at bar. The lower court in the Adair Case granted (not denied as stated by defendant at page 15 of his brief) the motion thus filed by the intervening defendant Whitney and an order of the New York Supreme Court was entered vacating the judgment annulling the marriage. On an appeal from this order the appellate court did not sustain "the intervenor's (defendant Whitney) right to plead the invalidity of the subject decree in any action in which it might be involved" as stated by the defendant herein at page 15 of his brief herein, but on the contrary reversed the lower court ruling and thereby refused to sustain the intervenor's (defendant Whitney) right to plead the invalidity of the annulment decree. In doing so the appellate court in first considering the question as to whether the defendant, Whitney, the moving party as an intervenor had such an interest in the an-

nulment action as to entitle him to move to vacate the annulment decree entered, at page 395, said:

"In the consideration of this case we are confronted at the very outset with the question as to whether the moving party here, Cornelius Vanderbilt Whitney, had such an interest in this action as to entitle him to move to vacate the decree entered herein. His interest, if any, is that he desires to show that at the time of his alleged entry into an engagement to marry the plaintiff, the plaintiff had no legal capacity to enter into such a contract and *to interpose that fact as a defense in the action instituted by her against him for breach of his engagement to marry*. I think it is clear that any person making an application for the vacation of a judgment must show that some legal or equitable right of his has been invaded by the judgment. Unless he can show this, he is not in a position to ask that the judgment be set aside." (15 R. C. L. 697, Sec. 149.)

Page 395, "Tyler v. Aspinwall (73 Conn. 493) was an action brought to set aside a decree of divorce upon the ground that it had been procured by fraud. The plaintiffs in the action claimed that the allegations of the complaint in the divorce action, that the defendant in that action was habitually intemperate and had been guilty of intolerable cruelty, and the *testimony in support of these allegations were utterly false and untrue*, that a wilful fraud had been committed upon the court and said judgment of divorce was wrongful and fraudulently obtained, to the damage and injury of the plaintiffs. The plaintiffs in the action were the heirs at law of the second husband of the divorcee. The defendant claimed her share of his estate as his widow. The result of this action, if successful, would have been to destroy her status as widow and entitle the plaintiffs to all of his property. The court denied the plaintiffs relief. Speaking of the judgment of divorce, it said: 'If such a judgment can, under any circumstances, *be reopened at the suit of a stranger*, this judgment cannot be reopened at the suit of a stranger, this judgment cannot be reopened at the suit of the plaintiffs. Its consequence, if harmful to them, are of too remote and indirect a character to give them any cause of action. The court is not called upon to exercise this power at the instance of such parties. Courts are in-

stituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties, and a party whose rights have not been invaded cannot be heard to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress. The courts are practically unanimous in holding that it is not error to refuse to exercise the power here in question, at the instance of a mere stranger whose rights are not at all affected by the judgment he seeks to have set aside, (citing cases). This is merely a special application of the wide, general principle that courts will act only in behalf of parties who show themselves entitled to such action. They sit to vindicate rights at the instance of parties whose rights have been invaded, and not to vindicate mere abstract principles of justice at the instance of anyone. In the case at bar the complaint, as finally amended, is merely a petition to set aside the judgment of divorce upon equitable grounds; *and it shows upon its face*, and without the aid of the allegations in the plea in abatement, that the plaintiffs were strangers to the judgment, and that their rights, legal or equitable, were in no way affected by it. There are no facts stated in the complaint which bring the plaintiffs within any of the recognized exceptions to the general rule that strangers to a judgment are not entitled to have it set aside. *The mere fact that the setting aside of the judgment would be an advantage to the plaintiffs is not enough; they must show that some legal or equitable right of theirs was invaded by the judgment, before they can complain of the refusal of the court to act upon their petition to have it set aside.*” (Italics supplied.)

At page 396, the court said:

“Practically the same question has been before the courts of this State and the same conclusion has been reached * * *.”

Concluding the court said, at page 397:

“In view of the conclusion reached, it seems unnecessary to determine any of the other questions involved. If the decree of annulment was void for lack of jurisdiction (*Berlinsky v. Berlinsky*, 204 App. Div. 480), this fact may be pleading in any action in which

the validity of such decree is involved. *If, however, the decree was only voidable, then it can only be set aside at the instance of a party whose rights have been invaded thereby.*" (Italics supplied.)

"The order vacating the decree of annulment should be reversed, with ten dollars costs and disbursements, and the motion denied."

Having produced the record of the Virginia divorce proceedings, the defendant is bound by what appears on the face of that record. This record shows on its face that the Virginia court had jurisdiction over the parties and over the subject matter, and that the divorce decree entered therein is valid in every other respect.

Bennett vs. Wilson, 65 Pac. 880, 133 Cal. 379.

In Bennett vs. Wilson, *Supra*, the court, at page 883, said:

"* * * But this does not mean that a judgment may be attacked by all strangers to the record. It applies only to cases 'where a party has a right to impeach a judgment'—as in the case considered; where the rights of the party existing at the date of the judgment were affected; and where the defeat of jurisdiction appeared from the record itself."

Page 883. "* * * These facts are not sufficient to bring the plaintiff within any class recognized by the authorities as entitled to impeach a judgment regular on its face. It is ingeniously put by the respondent's counsel that the entry of the judgment was 'an imposition on the court.' But this was not the case. The judgment was entered by default by the clerk, whose legal duty it was to enter it, and who had no discretion in the matter. Nor, had there been such imposition would it have been any concern of the plaintiff. The relations of Wilson to the corporation, in the absence of explanation, might give rise to a presumption of fraud against it. But fraud against the corporation, even had it been found, would not entitle the plaintiff to impeach the judgment." (Cases cited.)

Even if it were true that fraud and collusion were present,—the truth of which is denied—it would not give the defendant the right to plead it as a defense in the case at bar.

Fraud and collusion do not deprive the court of jurisdiction.

The "Third" defense relying on the alleged invalidity of the plaintiff's prior Virginia divorce decree, was properly stricken by the court below, because, as to the question of jurisdiction, it contained only a statement that the court which had rendered the decree was without jurisdiction, stating no facts in support of that contention, and, as to the remainder of the attack on said prior divorce decree, it is apparent that it is based on matters which at most, if true,—the truth of which is denied—made said decree erroneous and subject to reversal on appeal, but not void, and furnished no grounds for collateral attack.

The cases cited by the defendant under this heading all deal with the question of lack of jurisdiction and therefore, are not in point. Many of them support the contention here made by the plaintiff. They are all, with the exception of the case of *Adair v. Adair*, *supra*, (cited by defendant at page 14, his brief) as far as counsel for plaintiff have been able to learn, based on evidence after trial and not on pleadings.

For the above reasons it is respectfully submitted that the order entered by the court below on December 7, 1943, striking defense numbered "Third" from the defendant's amended answer should be affirmed.

2. The court below committed no error in striking defense numbered "fourth" from amended answer to amended complaint.

Defense numbered "Fourth" (App. 11-12) avers that the plaintiff, shortly after the inception of defendant's acquaintance with her, voluntarily stated that she had been married three times and divorced only twice; and that she had a legitimate child, then less than two years old by her third husband, from whom she was still undivorced but per-

manently separated, and that these statements were repeated from time to time by the plaintiff to the defendant and that the plaintiff is now therefore estopped to deny that she was legally ineligible to marry. The defendant does not aver that these statements were relied upon by him to his detriment, nor that the plaintiff was in fact married three times and divorced only twice, etc. We contend that if said statements be true,—the truth of which is denied—they amount to evidence only and cannot be pleaded as a defense on the part of the defendant, but should be introduced as evidence and passed upon by the trial justice at the trial of the case. In addition, said statements are argumentative as to why the defendant may not have agreed or promised to marry the plaintiff. Being evidentiary only, we do not consider the citation of any authorities necessary and contend that said defense should be stricken from defendant's amended answer.

3. The court below committed no error in striking defense numbered "fifth" from amended answer to amended complaint.

Defense numbered "Fifth" (App. 12-14) deals with the alleged prior unchastity of the plaintiff. We respectfully submit that, under the circumstances of this case that alleged prior unchastity does not constitute a defense. The defendant does not claim that any promise of marriage on his part was broken by him because of any prior unchastity on the part of the plaintiff. On the contrary, in both his original and amended answers he denies that any promise of marriage ever was made by him. On the defendant's own statement pleaded by him in his amended answer, he had no evidence or knowledge of the alleged unchastity until many months after the date of the alleged breach of promise to marry the plaintiff. Obviously, the alleged breach of promise to marry could not have been based upon

the grounds of any alleged prior unchastity. Where an agreement to marry is broken for some other reason,—some other insufficient ground, or for no reason at all, it is no defense to an action for breach of promise to marry that the plaintiff had been guilty of prior unchastity. In other words, the prior unchastity, and not some other reason or grounds, must have been the occasion for the breach in order to be available as a defense.

Bowman vs. Bowman, 153 Ind. 498, 55 N. E. 422.

Shehan vs. Barry, 27 Mich. 217, 223.

For the above reason defense numbered "Fifth" should be stricken from defendant's amended answer.

4. The court below committed no error in striking defense numbered "sixth" from amended answer to amended complaint.

Defense numbered "Sixth" (App. 14) avers that the plaintiff having sued one Charles C. Drummond, in the District Court of the United States for the District of Columbia for damages for breach of promise of marriage and said suit having been thereafter withdrawn, had shown herself to be "claim-minded" and thereby disentitled to maintain this action against the defendant. We contend that the mere fact that the plaintiff may have filed a similar suit, to the one at bar, against some one else would not be a defense to her right to bring such an action against the defendant. It is doubtful that such a fact would even be admissible as evidence. At best it is purely evidentiary and should be submitted to the trial justice at the trial of this case for a determination as to its admissibility as evidence. This court in the case of *Mintz vs. Premier Cab Asso., Inc.*, 75 App. D. C. 389, 127 Fed. (2nd) 744, did rule that testimony showing claim-mindedness under the particular facts disclosed by the evidence was admissible as evidence, but did not rule that it constituted a defense. The facts and circumstances in the instant case are not the same as dis-

closed in the Mintz case. The facts in the Mintz case showed that the plaintiff had been in a similar accident in a Diamond Cab and made claim for injuries, about two years before; also whether or not plaintiff had fallen in a beauty parlor, and made claim for injuries about April, 1937. The trial court allowed counsel for the defendant, Premier Cab Ass'n, to introduce these facts in evidence, during cross-examination of the plaintiff, over the objection of counsel for the plaintiff. The plaintiff's appeal attacked the trial court's action (1) in admitting this evidence; (2) in refusing to rule that it was relevant only to the question whether her injuries were caused by those accidents; and (3) in permitting appellee's counsel to argue that it showed plaintiff to be "claim minded." This Court merely passed on the admissibility of that testimony regarding similar accidents, and not on whether such facts constituted a defense and held that the testimony was admissible and said that whether the plaintiff was merely unlucky or was claim-minded was for the jury. In passing upon the questioned testimony in the Mintz case, this Court, at page 389, said:

"A jury may discount or disregard testimony which runs counter to normal experience. To show that it runs counter to normal experience tends to contradict it."

"Generally it is proper to permit upon cross-examination the bringing out of anything tending to contradict, modify or explain the testimony given by a witness in his direct examination."

Being evidentiary only, we do not consider the citation of authorities necessary and contend said defense should be stricken from the amended answer.

5. The court below committed no error in striking defense numbered "tenth" from amended answer to amended complaint.

Defense numbered "Tenth" (App. 18-19) avers that the defendant delivered to the plaintiff on November 13, 1940,

a check on the National Metropolitan Bank of Washington, D. C., in consideration of her then acknowledgment to him that she had been fully compensated for all of her services theretofore rendered for and at the instance of the defendant; and that said sum would be and was accepted by the plaintiff in full and final settlement, accord and satisfaction of any and all claims the plaintiff then or thereafter might have asserted against the defendant for any cause whatsoever. Said defense does not plead a release, nor does it allege that said check contains any notation thereon which could or did under the law constitute a release or accord and satisfaction. Unless the check contained something over the signature of the plaintiff to the effect that she had released all claims against the defendant, it is purely self-serving and for that reason is totally legally insufficient as a defense.

It is respectfully submitted, that the case at bar being a tort suit for an unliquidated amount and not for any services rendered by the plaintiff for and at the instance of the defendant, the defendant must plead a release in writing signed by the plaintiff and not a mere check with nothing contained thereon to show that the plaintiff accepted the same in full and final settlement of her claim against the defendant.

The facts in the case of *Torrey v. Hardy*, 106 S. W. 1100, cited by the defendant at Page 40, of his brief, show that the defendant in that case made an offer of settlement, in the sum of \$400.00, in a letter written by him to the plaintiff and further that the plaintiff in a letter written by her replying to the defendant's letter making the offer, accepted the said \$400.00 in full settlement of her claim. The *Torrey v. Hardy* case supports the contention here made by the plaintiff.

For the above reasons the defendant's "Tenth" defense has no merit and was properly stricken from the amended answer by the court below.

6. The court below committed no error in denying the motion of the defendant to add proposed supplemental defense numbered "eleventh" to amended answer.

Proposed supplemental defense numbered "Eleventh" shows on its face that it could not constitute a defense to the instant action. In this defense the defendant avers that the plaintiff had regarded herself as, and had so stated to the defendant, that she was his common-law wife, which admission and assumption the defendant, in said defense, specifically denies and at the same time states that the plaintiff having so regarded herself, and having insisted that she had been defendant's common-law wife, should not now be heard to complain herein of the defendant's breach of his alleged promise to have married her. In order for the plaintiff to become the common-law wife of the defendant there would have to be a common-law marriage recognized by the law and not something merely in the mind of the plaintiff or any other person. Assuming what the defendant says in this respect and how he says it, to be true,—the truth of which is denied—here again, as in the "Fourth" and "Sixth" defenses, the same would be purely evidentiary, if anything. The defendant in one breath says that plaintiff regards herself as, and had so stated to him, that she was, his common-law wife and in the next breath denies that a common-law wife relationship exists. In addition, here again, as in the "Fourth" and "Sixth" defenses the matters contained in this defense, namely, defense numbered "Eleventh" are argumentative. Being evidentiary only, if it amounts to even that, we do not consider the citation of authorities necessary. We contend that said "Eleventh" defense does not constitute a good defense and was properly stricken from the amended answer by the court below.

Conclusion.

In conclusion, it is respectfully submitted that the court below committed no error and that, accordingly, the orders entered by the court below, specially appealed from, should be affirmed.

Respectfully submitted,

SIMON, KOENIGSBURGER & YOUNG,
By — ARTHUR L. WILLCHER,
1426 H Street, N. W.,
LESTER WOOD,
821 — 15th Street, N. W.,
Washington, D. C.,
Attorneys for Appellee.

JOINT APPENDIX TO BRIEFS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 8662

OTIS BEALL KENT, *Appellant*

v.

MARGARET BUCHANAN, *Appellee*

No. 8679

OTIS BEALL KENT, *Appellant*

v.

MARGARET BUCHANAN, *Appellee*

SPECIAL APPEALS FROM INTERLOCUTORY ORDERS OF THE
DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA

BATAVIA TIMES, LAW PRINTERS,

BATAVIA, N. Y.

CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

UNITED STATES

COURT OF APPEALS FOR THE

DISTRICT OF COLUMBIA

MAY 13 1944

W. Stewart

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IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

MARGARET BUCHANAN, <i>Plaintiff</i> ,	} Civil Action No. 12,718
v.	
OTIS BEALL KENT, <i>Defendant</i> .	

**Amended Complaint for Damage for Breach of Promise
to Marry and for Slander.**

(Filed Sept. 8, 1941.)

1. This is an action to recover more than one thousand dollars (\$1,000), exclusive of interest and costs.

2. In March, 1940, the plaintiff was, and for many years prior thereto had been, and since that time, to and including the present time, has continued to be, a registered nurse, qualified and authorized to practice the profession of nursing in the District of Columbia.

3. ¹*Between March, 1940 and the end of June, 1940*, in consideration of the promise and agreement of the plaintiff to marry the defendant, the defendant promised and agreed, to marry the plaintiff within a reasonable time, and thereupon and thereafter the plaintiff was, and continued to be, ready, able and willing to marry the defendant and so tendered herself to him. Yet the defendant, not regarding his promise and agreement, did not marry the plaintiff, but, on the contrary, refused to do so, and, in ²*December, 1940*, stated to the plaintiff that he would not marry her, and by reason thereof the plaintiff has been damaged in the sum of five hundred thousand dollars (\$500,000).

¹ Date of alleged promise fixed by bill of particulars filed October 23, 1941, as "on or about June 17, 1940".

² Date of alleged breach originally fixed as in "November" of 1940. Change to "December" authorized by Order of District Court dated March 20, 1942.

4. Upon the refusal of the defendant to marry the plaintiff as hereinabove set forth, the plaintiff placed the matter in the hands of certain attorneys to represent her in that behalf, and one of said attorneys thereupon, on January 4, 1941, addressed and sent to the defendant a letter in which he advised him that they represented the interests of the plaintiff in regard thereto and requested him to communicate with said attorney.

5. Thereafter the defendant maliciously and with the intent of frightening and intimidating the plaintiff so that she would not prosecute her claim against him, and for the purpose of injuring her in her good name and reputation and in her professional standing and professional reputation, by himself and by and through other persons whom he procured to do so, did or caused to be done the things hereinafter set forth.

6. The defendant telephoned to one Elizabeth D. Coleman, who was then and there an employee or official of the Nurses' Registry of the District of Columbia and stated to the said Coleman that he had a complaint to make against a nurse who had come to nurse him; that said nurse, after her nursing duties were over, continued to stay in his apartment making a nuisance of herself, and would not leave, no matter what he did; that said nurse received her calls at his apartment and stayed there as though it were her home, and that he finally had to throw her belongings in the hall and lock the door so that she could not get in. The defendant further stated to the said Coleman that the nurse to whom he referred was suing him for breach of promise. The plaintiff had been a nurse in the home of the defendant, nursing the mother of the defendant, during the period beginning October 20, 1939, and ended June 14, 1940, upon which last-mentioned date the mother of the defendant had died. The record of the Nurses' Registry showed said employment of the plaintiff, and the defendant intended the

said Coleman to understand that he was referring to the plaintiff, and the said Coleman did in fact understand that the defendant was referring to the plaintiff. All of said statements made by the defendant to the said Coleman were made with malice and were false, except that the plaintiff had stayed in the apartment of the defendant after the death of his mother, but she had done so at the request of the defendant.

7. Thereafter the defendant caused a certain woman to call at said Nurses' Registry many times and state that she wanted the plaintiff investigated, and caused other telephone calls to be made to the said Coleman by a person or persons purporting to be credit agencies, who stated that they wanted to get in touch with the plaintiff because the plaintiff owed certain liabilities. Said calls were
3 caused to be made by the defendant, and were made for the purpose of injuring the plaintiff in her professional standing at said Nurses' Registry.

8. The defendant caused many telephone calls to be made to said Nurses' Registry and to the said Coleman, and caused telephone calls to be made to Doctor's Hospital and Emergency Hospital, urging the said Registry and hospitals to get rid of the plaintiff and to get her out of town.

9. While the plaintiff was on duty at Emergency Hospital, the defendant caused another person to telephone to the Day Supervisor of said hospital and request said Day Supervisor to deliver to the plaintiff the following message: "Mildred called and Mrs. Ball was around to see Mrs. Buchanan and left a message if she doesn't leave her husband alone, there will be trouble at twelve midnight." The plaintiff did not know any woman named Mrs. Ball nor any husband of any Mrs. Ball, and said message was caused by the defendant to be delivered to said Day Supervisor for

the purpose of injuring the plaintiff in her professional standing and for the purpose of falsely causing it to be believed that she was having an illicit affair with the husband of the so-called Mrs. Ball, whereas in truth and fact the plaintiff did not know any such person.

10. In February, 1941, the defendant stated to one James Keane that the plaintiff was a prostitute and a blackmailer. Said statements were and are untrue.

By reason of these acts of the defendant, the plaintiff has been damaged in her good name, fame and reputation and has lost, and will in the future lose, opportunities for employment which otherwise she would have had, to the damage of the plaintiff in the sum of one hundred thousand dollars (\$100,000). These actions of the defendant were committed with express and actual malice on his part. The plaintiff claims exemplary damages of one hundred thousand dollars (\$100,000).

WHEREFORE the plaintiff demands judgment against the defendant for seven hundred thousand dollars (\$700,000), besides costs.

SIMON, KOENIGSBERGER & YOUNG,
Attorneys for Plaintiff.

6 **Answer to Amended Complaint.**

(Filed Nov. 3, 1941.)

First Defense

The amended complaint fails to state an actionable claim against the defendant.

Second Defense

The defendant denies that on or about June 17, 1940, or at any other time, he promised and agreed to marry the

plaintiff within a reasonable time or at any other time, as alleged in Paragraph 3 of the amended complaint; and, excepting only the averments therein concerning the defendant's refusals to marry the plaintiff, the defendant denies all the other allegations in said Paragraph contained.

Further answering the allegations of the aforesaid Paragraph 3, the defendant states that the plaintiff on one and only one occasion since her first introduction to him mentioned to or discussed with him the question of her alleged desire to marry him; that on said occasion, on or about November 5, 1940, the Plaintiff suggested to the defendant that he marry her, as she was tired of her nursing duties, and desired to be relieved of the further burden of her self-support; that, upon the defendant's refusal to comply with her said suggestion, she demanded that he give her a sufficient sum of money to insure her financial independence during the remainder of her lifetime; and that, upon the defendant's refusal to accede to her said demand, she admonished him to reconsider his said refusal, and
 7 threatened otherwise that she and her attorneys would "drag his name through the mud from one end of the world to the other."

Third Defense

The defendant denies that any attorney representing or purporting to represent the plaintiff addressed and sent to him any letter or other communication on January 4, 1941, as alleged in Paragraph 4 of the amended complaint; but the defendant admits that, on or about January 10, 1941, he received a registered letter from a certain attorney wherein he stated that he and another named attorney represented the plaintiff in the matter of certain alleged claims against the defendant, and requested that the defendant or his representatives communicate with said attorney within the ensuing week, with a view to a voluntary settlement of said alleged claims. Otherwise, the defendant

denies the allegations in paragraph 4 of the amended complaint.

Further answering the aforesaid Paragraph 4, the defendant states that two of the aforesaid attorneys for the plaintiff, and at least one member of the firm whose name is subscribed to her amended complaint, were subsequently and repeatedly advised by intermediaries well-informed as to the material facts, and friendly to said attorneys as well as to the defendant, that the plaintiff's alleged claims against the defendant were unfounded and fraudulent, and that her and their threatened action against the defendant amounted to and constituted blackmail; that all said representations by said intermediaries then were and still are true; and that none of the attorneys named in the text or on the letterhead of the aforesaid letter received by the defendant on January 10, 1941, has subscribed to any of the plaintiff's pleadings herein, or been otherwise therein identified as now representing the plaintiff in any professional or other capacity, or as now otherwise interested in her aforesaid alleged claims against the defendant.

Fourth Defense

8 The defendant denies each and every allegation contained in Paragraph 5 of the amended complaint.

Fifth Defense

Answering Paragraph 6 of the amended complaint, the defendant admits that on or about January 6, 1941, he communicated by telephone with a person who then and thereby introduced herself as Mrs. Coleman, and whom the defendant believes and thereupon admits to have been the Elizabeth D. Coleman named by the plaintiff in said Paragraph, as then and there an employee or official of the Nurses' Registry of the District of Columbia; and the Defendant avers that his every statement to the aforesaid Elizabeth D. Coleman was and is true; but the defendant denies all

the allegations of Paragraph 6 of the amended complaint detailing the imputed text or substance of his alleged conversation with said Elizabeth D. Coleman.

Further answering the aforesaid Paragraph 6, the defendant admits that the plaintiff, in her professional capacity as a nurse, had attended the defendant's Mother in her last illness, from October 20, 1939, through June 14, 1940; but the defendant states that he did not so advise the aforesaid Elizabeth D. Coleman, nor otherwise disclose to her the identity of the plaintiff as the subject of their aforesaid conversation in January of 1941. Except as hereinabove admitted, the defendant denies all the allegations of Paragraph 6 of the amended complaint.

Sixth Defense

The defendant denies each and every allegation contained in Paragraph 7 of the amended complaint.

Seventh Defense

The defendant denies each and every allegation contained in Paragraph 8 of the amended complaint.

Eighth Defense

9 The defendant denies each and every allegation contained in Paragraph 9 of the amended complaint.

Ninth Defense

Answering Paragraph 10 of the amended complaint, the defendant admits that on one and only one occasion he communicated by telephone with an individual whom he has never to his knowledge met in person, but who was identified to the defendant by the person who had volunteered the suggestion of and had actually made the aforesaid call by telephone as "Mr. Keane"; and that during the course of said conversation the defendant stated, in response to a direct and insistent question by the said purported Keane, that a woman now identified as the plaintiff was attempting

to blackmail the defendant, which said averment then and there was and still is true; but the defendant denies that he ever stated that the plaintiff was a prostitute and a blackmailer, as alleged in Paragraph 10 of the amended complaint.

Tenth Defense

The defendant denies that the plaintiff has been damaged as alleged in Paragraph 3 of the amended complaint, in the sum of Five Hundred Thousand Dollars or in any other sum.

Eleventh Defense

The defendant denies that he has ever at any time either committed or instigated any act of deliberate or intended malice against the plaintiff, or that any intentional act of his or in his behalf has damaged the plaintiff in her alleged good name, fame and reputation, or has lost to her or will lose to her in the future any opportunity for employment which might otherwise have been available to her, with a resultant or consequential damage to her in the sum of One Hundred Thousand Dollars or Two Hundred Thousand Dollars or any other sum, as in the amended complaint alleged; and the defendant denies that the plaintiff
 10 has, or since the inception of his acquaintance with
 her has had, the good name, fame and reputation claimed by or imputed to her in her said complaint.

WHEREFORE, the defendant demands that the amended complaint in this cause be dismissed with costs against the plaintiff.

WILLIAM H. COLLINS,
Attorney for Defendant.

13 **Amended Answer to Amended Complaint.**

(Filed June 4, 1943.)

(Defenses ordered stricken from Amended Answer, and sought by instant Appeals to be reinstated, hereinafter identified and distinguished by printing in **bold-faced type**.)

First Defense

The amended complaint fails to state an actionable claim against the defendant.

Second Defense

The defendant denies that on or about June 17, 1940 or at any other time, he promised and agreed to marry the plaintiff within a reasonable time or at any other time, as alleged in Paragraph 3 of the amended complaint; and, excepting only the averments therein concerning the defendant's refusals to marry the plaintiff, the defendant denies all the other allegations in said Paragraph contained.

Further answering the allegations of the aforesaid Paragraph 3, the defendant states that the plaintiff on one and only one occasion since her first introduction to him mentioned to or discussed with him the question of her alleged desire to marry him; that on said occasion, on or about November 5, 1940, the plaintiff suggested to the defendant that he marry her, as she was tired of her nursing duties, and desired to be relieved of the further burden of her self-support; that, upon the defendant's refusal to comply with her said suggestion, she demanded that he give her a sufficient sum of money to insure her financial independence during the remainder of her lifetime; and that, upon the defendant's refusal to accede to her said demand, she ad-

14 admonished him to reconsider his said refusal, and threatened otherwise that she and her attorneys would "drag his name through the mud from one end of the world to the other."

Third Defense

Further answering paragraphs 2 and 3 of the amended complaint, the defendant avers that, since his last communication with the plaintiff on, to wit, December 23, 1940, he has been informed, and on information and belief avers, that a decree bearing date of March 6, 1930, and purporting to have dissolved the plaintiff's marriage to her husband, John Auld Robinson, Jr., of record in the Circuit Court of the City of Richmond, Commonwealth of Virginia, in a cause entitled *Margaret B. Robinson, plaintiff, vs. John Auld Robinson, Jr., defendant*, a certified copy of the bill of complaint, wherein, together with a certified copy of the transcript of testimony before a Commissioner in Chancery, and of the decree aforesaid, are hereto attached as Exhibits "A-1", "A-2", and "A-3" and by this reference made parts hereof, was obtained by the plaintiff through her deliberate fraud and collusion with her aforesaid husband, and was entered by a Court entirely devoid of jurisdiction over either of the parties or over the subject matter of said decree in an uncontested proceeding fraudulently instituted by the plaintiff herein, through an attorney employed and paid by the aforesaid John Auld Robinson, Jr., the respondent therein, on the asserted ground of his alleged adultery with an unnamed and unidentified woman whom the defendant herein has been informed, and on information and belief avers, was non-existent; that the aforesaid decree was obtained and based upon a purported confession by said respondent to the plaintiff in said cause and herein, of his alleged adultery with the aforesaid unnamed and unidentified woman, without any corroboration of said confession or of said purported facts as required by the jurisdictional statutes of the Commonwealth of Virginia; that the said decree having been entered by a Court without jurisdiction of the parties or of the subject matter as aforesaid,

15 was and is wholly void ab initio, and is not entitled to full faith and credit under the Constitution of the United States; that the plaintiff herein, therefore, is still legally married to her said husband; that at the time of the filing of her amended complaint herein, she was ineligible to a valid remarriage or to an engagement to marry the defendant or anyone else, even if the defendant had agreed and promised to marry her, which he never did; and that his alleged breach of any such agreement or promise would not have afforded the plaintiff any actionable basis for any of her claims herein asserted against the defendant.

Fourth Defense

Further answering Paragraphs 2 and 3 of the amended complaint, the defendant avers that the plaintiff, shortly after the inception of his acquaintance with her, voluntarily stated that she had been married three times and divorced only twice; and that she had a legitimate child, then less than two years old by her third husband, from whom she was still undivorced but permanently separated; that the plaintiff consistently repeated the aforesaid statements from time to time to the defendant and to divers other persons in his presence; that the defendant, an attorney by profession, throughout the said period of his acquaintance with the plaintiff, and until approximately nine days subsequent to his receipt of the plaintiff's first written demand from her attorneys for compensation for her damages herein alleged, believed and accepted her aforesaid statements as true and regarded her as a married woman, ineligible to a valid remarriage or to a valid engagement to marry the defendant or anyone else; that, even if the defendant had agreed or promised to marry her, the plaintiff, which he never did, the plaintiff by her aforesaid statements is now

estopped to deny that she was legally ineligible to remarry or to an engagement to marry the defendant or anyone else; and that she is therefore estopped to assert any actionable basis for her claims herein against the defendant.

Fifth Defense

Further answering Paragraphs 2 and 3 of the amended complaint, the defendant herein avers that his final
16 interview with the plaintiff occurred on, to wit, December 23, 1940, as aforesaid; and that he then fully and firmly believed that the plaintiff had been legally married three times and twice divorced, and that she was the mother of a legitimate child, to wit, Wiley Drummond, a certified copy of whose certificate of birth in the District of Columbia is hereto attached as Exhibit "B", and by this reference made a part hereof; that subsequent to the filing of the aforesaid amended complaint and of the defendant's answer thereto, the defendant first definitely ascertained that the plaintiff herein had lived in open and notorious adultery with one William Spence Harvey, Jr., over a period of more than nine years, intervening March 1928 and May 11, 1937, at various places in Virginia, Georgia, North Carolina, New Jersey, New York and the District of Columbia, as more fully set forth in a deposition by said William Spence Harvey, Jr., filed herein and made a part of the record of this case; and that the plaintiff, although never legally married to the aforesaid William Spence Harvey, Jr., throughout the aforesaid period was commonly known as "Mrs. William Spence Harvey, Jr."; and the defendant herein further avers that sometime subsequent to his aforesaid final interview with the plaintiff on, to wit, December 23, 1940, he first ascertained that the plaintiff's aforesaid child, Wiley Drummond, was illegitimate; that the plaintiff herein had been named as correspondent in a

charge of adultery in the Circuit Court of the City of Richmond, Commonwealth of Virginia, in a divorce action captioned *Linda Willingham Drummond vs. Charles C. Drummond*, a certified copy of the amended bill of complaint wherein, together with a certified copy of the final decree awarded to said Linda Willingham Drummond being hereto attached as Exhibits "C-1" and "C-2" and by this reference made parts hereof; that the plaintiff herein had cohabited openly and notoriously in adultery with the aforesaid Charles C. Drummond, from about the month of March, 1937 until a date subsequent to January 1, 1938; and that although never legally married to him, she had been commonly known throughout said period as "Mrs. Charles

17 Coburn Drummond"; that the plaintiff herein on, to wit, June 23, 1938, had sworn to an affidavit duly filed in the Juvenile Court of the District of Columbia that the aforesaid Charles C. Drummond was the father of her bastard child, born at the Columbia Hospital in the District of Columbia, on May 12, 1938; and that thereafter on, to wit, September 28, 1938, said Charles C. Drummond had been ordered by the Juvenile Court of the District of Columbia to support said bastard child, described in said order as "Wiley Buchanan" hereinabove referred to as Wiley Drummond, a certified copy of the complaint of the plaintiff herein and of the Juvenile Court information and order being hereto attached as Exhibits "D-1", "D-2", and "D-3" and by this reference made parts hereof; that the defendant herein, since the plaintiff's assertion of her aforesaid claims against him, first ascertained that the plaintiff herein on, to wit, June 13, 1938 had sued the aforesaid Charles C. Drummond in the District Court of the United States for the District of Columbia, for an alleged breach of promise to marry her, in a cause entitled *Margaret B. Buchanan vs. Charles C. Drummond*, Law No. 90,267, a certified copy of the declaration wherein is hereto at-

tached as Exhibit "E" and by this reference made a part hereof; and that said cause of action was later discontinued, with the consent of the plaintiff herein on, to wit, September 28, 1938, and was withdrawn by her then attorneys on, to wit, October 1, 1938; that the plaintiff's thereby proved unchastity prior to the defendant's alleged promise to have married her never having been disclosed and being unknown to the defendant at the time of said alleged promise, would legally have justified a breach of said alleged promise even if the defendant had so committed himself, which he never did; that the plaintiff's claims herein for damages for said alleged breach should be denied; and that her amended complaint, insofar as it seeks to assert said claims, should be dismissed.

Sixth Defense

Further answering Paragraphs 2 and 3 of the amended complaint, the defendant avers that the plaintiff herein, having sued the aforesaid Charles C. Drummond, in
 18 the District Court of the United States for the District of Columbia in a cause entitled *Margaret B. Buchanan vs. Charles C. Drummond*, Law No. 90,267, a certified copy of the declaration wherein is hereto attached as Exhibit "E" and by this reference made a part hereof as aforesaid; and having thereafter assented to a discontinuance of said action on, to wit, September 28, 1938, and said action having been withdrawn by her then attorneys on, to wit, October 1, 1938, as aforesaid, had shown herself to be "claim-minded", and thereby disentitled to maintain her asserted action herein against the defendant.

Seventh Defense

The defendant denies that the plaintiff has been damaged, as alleged in Paragraph 3 of the amended complaint, in the sum of Five Hundred Thousand Dollars (\$500,000.00) or any other sum.

Eighth Defense

Answering the averments in Paragraphs 4 to 10 inclusive, of the amended complaint herein:

The defendant denies that any attorney representing or purporting to represent the plaintiff addressed or sent to him any letter or other communication on January 4, 1941, as alleged in Paragraph 4 of the amended complaint; but the defendant admits that, on or about January 10, 1941, he received a registered letter from a certain attorney wherein he stated that he and another named attorney represented the plaintiff in the matter of certain alleged claims against the defendant, and requested that the defendant or his representatives communicate with said attorney within the ensuing week, with a view to a voluntary settlement of said alleged claims.

Further answering the aforesaid Paragraph 4, the defendant states that two of the aforesaid attorneys for the plaintiff, and at least one member of the firm whose name is subscribed to her amended complaint, were subsequently and repeatedly advised by intermediaries well-informed as to the material facts, and friendly to said attorneys as well as to the defendant, that the plaintiff's alleged claims against the defendant were unfounded and fraudulent, and that her and their threatened action against the defendant amounted to and constituted blackmail; that all said representations by said intermediaries then were and still are true; and that none of the attorneys named in the text or on the letterhead of the aforesaid letter received by the defendant on January 10, 1941, has subscribed to any of the plaintiff's pleadings herein. Otherwise, the defendant denies all the allegations of Paragraph 4 of the amended complaint.

The defendant denies each and every allegation contained in Paragraph 5 of the amended complaint.

Answering Paragraph 6 of the amended complaint, the defendant admits that on or about January 6, 1941, he communicated by telephone with a person who then and thereby introduced herself as "Mrs. Coleman", and whom the defendant believes and thereupon admits to have been the Elizabeth D. Coleman named by the plaintiff in said paragraph, as then and there an employee or official of the Nurses' Registry of the District of Columbia; and the defendant avers that his every statement to the aforesaid Elizabeth D. Coleman was and is true; but the defendant denies all the allegations of Paragraph 6 of the amended complaint detailing the imputed text or substance of his alleged conversation with said Elizabeth D. Coleman.

Further answering the aforesaid Paragraph 6, the defendant admits that the plaintiff, in her professional capacity as a nurse, had attended the defendant's Mother in her last illness, from October 20, 1939, through June 14, 1940; but the defendant states that he did not so advise the aforesaid Elizabeth D. Coleman, nor otherwise disclose to her the identity of the plaintiff as the subject of their aforesaid conversation in January of 1941. Except as hereinabove admitted, the defendant denies all the allegations of Paragraph 6 of the amended complaint.

The defendant denies each and every allegation contained in Paragraph 7 of the amended complaint.

20 Further answering the aforesaid Paragraph 7, the defendant avers that since his aforesaid final interview with the plaintiff on, to wit, December 23, 1940, he has been informed and believes and therefore avers that the plaintiff, throughout the period contemplated by said paragraph, owed divers and sundry liabilities including a claim for professional services theretofore rendered by Dr. William J. Cusack, in the delivery and circumcision of the plaintiff's aforesaid child, Wiley Buchanan, which said

bill the James Keane mentioned in the 10th Paragraph of the amended complaint herein, on the only occasion on which the defendant ever had any conversation with him, informed the defendant that he had been trying for nearly three years to have collected from the plaintiff, but to no avail.

The defendant denies each and every allegation contained in Paragraphs 8 and 9 of the amended complaint.

Answering Paragraph 10 of the amended complaint, the defendant admits that on one, and only one, occasion he communicated by telephone with an individual whom he has never met in person, but who was identified to the defendant by the person who had volunteered the suggestion of, and had actually made the aforesaid call by telephone, as "Mr. Keane"; and that during the course of said conversation the defendant stated, in response to a direct and insistent question by the said purported "Mr. Keane," that a woman now identified as the plaintiff was attempting to blackmail the defendant, which said averment then and there was and still is true; but the defendant denies that he ever stated that the plaintiff was a prostitute and a blackmailer, as alleged in Paragraph 10 of the amended complaint.

Ninth Defense

The defendant denies that he has ever at any time either committed or instigated any act of deliberate or intended malice against the plaintiff, or that any intentional act of his or in his behalf has damaged the plaintiff in her
 21 alleged good name, fame and reputation, or has lost to her or will lose to her in the future any opportunity for employment which might otherwise have been available to her, with a resultant or consequential damage to her in the sum of One Hundred Thousand Dollars (\$100,-

000.00) or Two Hundred Thousand Dollars (\$200,000.00) or any other sum, as in the amended complaint alleged; and the defendant denies that the plaintiff has, or since the inception of his acquaintance with her has had the good name, fame and reputation claimed by or imputed to her in her said complaint; and finally answering the averments of the aforesaid Paragraphs 4 to 10 inclusive, of the amended complaint, the defendant is informed and believes and thereupon avers that the plaintiff herein, for a period of more than fifteen years preceding the filing of this amended answer, has been a lewd, lascivious, unchaste and immoral woman, as more particularly set forth in the Fifth Defense herein, referred to and by reference incorporated in this paragraph as a part thereof; and the defendant further avers that the plaintiff herein, for more than a year preceding the filing of her aforesaid amended complaint, had sought to extort from the defendant herein large sums of money to which she was not and is not entitled, by means of intimidations and threats alternatively to have dragged the defendant's name "through the mud from one end of the world to the other"; and that her action herein and every act in furtherance of said action has been and is a deliberate part and parcel of a preconceived plan to have enriched herself unjustly, unconscionably and illegally at the expense of the defendant.

Tenth Defense

Finally answering the demand of the plaintiff in her amended complaint herein, the defendant avers that he delivered to the plaintiff on, to wit, November 13, 1940, a check on the National Metropolitan Bank of Washington, D. C., for One Hundred Dollars (\$100.00), in consideration of her then acknowledgment to him that she had been fully com-

JAMES R. KIRKLAND,
Attorney for Defendant.

IN THE CIRCUIT COURT
OF THE CITY OF RICHMOND, VIRGINIA.

BILL OF COMPLAINT.

That she was united in marriage to the said John Auld Robinson Jr. on the 29th day of July, 1922, as will more fully appear from a copy of their marriage certificate hereto attached as a part of this bill and marked "Exhibit A".

That she has been an actual bona fide resident of the State of Virginia, and been domiciled in the City of Richmond, for a period of more than one year next before the commencement of this suit, and that she and her said husband last lived and cohabited together as man and wife at Richmond, Virginia.

That the said John Auld Robinson Jr. has since the aforesaid marriage committed adultery; that is to say, that in June, 1928, your complainant after returning from work, one night about 11:30 P. M., found her said husband in room with a woman by the name of Jenny, with lights out and when accused of adultery, defendant admitted same. That since, your complainant learned her said husband has lived with the same woman for five months as man and wife.

That your complainant has not cohabited with the said John Auld Robinson Jr. since having had knowledge of the adultery committed by him.

That at the time of the institution of this suit, it has not been five years since the adultery occurred and it
24 was not committed by procurement or connivance of your complainant.

Upon consideration whereof, and forasmuch as your complainant is without remedy save in a court of equity where matters of this sort are alone and properly cognizant, she prays that the said John Auld Robinson, Jr. may be made a party defendant to this bill and required to answer but not under oath, oath being hereby expressly waived; that process may issue; that she may be divorced from her husband, the said John Auld Robinson Jr., from the bond of matrimony; and that all such other, further

and general relief may be afforded your complainant as the nature of her case may required or to equity may seem meet.

And she will ever pray.

MARGARET B. ROBINSON,
By Counsel.

EXHIBIT A-2.

25 MARGARET B. ROBINSON, a witness of lawful age, introduced in her own behalf, being first duly sworn, deposes and says as follows:

By Mr. Hirschberg:

Q. State your name, age, residence and occupation?

A. Margaret B. Robinson, age 29 years, 608 N. Boulevard, I am a registered nurse.

Q. Have you been an actual bona fide resident of the State of Virginia for a period of more than one year next before the commencement of this suit?

A. I have.

Q. Have you been domiciled in the City of Richmond, Virginia, for a period of more than one year next before the commencement of this suit?

A. Yes.

Q. Where did you and your husband last live and cohabit together as man and wife?

A. Richmond, Virginia.

Q. Mrs. Robinson, in your bill of complaint you charge your husband with adultery, please state the facts and circumstances pertaining the alleged charge?

A. Well, one night in June, 1928, the exact date I can't remember, I returned from work about 11:30 P. M. and found my husband in a room with a woman by the name of Jenny; the lights were out and when I confronted my

husband with this, he acknowledged having committed adultery with this girl.

26 Q. Was this the first time your husband had deceived you?

A. No. I had every reason to believe he wasn't faithful, but it was the first time I had ever seen with my own eyes.

Q. Why were you returning at such a late hour?

A. My work required it. I am a nurse and my work necessitated my coming and going at all hours.

Q. Has it been five years since you had knowledge of your husband having committed adultery?

A. No. It has not.

Q. Have you lived or cohabited with your husband since learning of the adultery?

A. I have not.

Q. The adultery mentioned in your bill of complaint between your husband and this woman, "Jenny", was not committed by procurement or connivance by you, was it?

A. Indeed not.

And further this deponent saith not.

(Signed) MARGARET B. ROBINSON.

FRANCK MORTIMORE WATKINS, a witness of lawful age, introduced on behalf of the plaintiff, being first duly sworn deposes and says as follows:

By Mr. Hirschberg:

Q. State your name, age, residence and occupation?

A. Franck Mortimore Watkins, age 25 years, 8 W. Franklin Street, Richmond, Virginia, Assistant Manager Regal Shoe Co.

Q. Are you acquainted with the parties to this suit?

A. Yes.

Q. Mrs. Robinson has charged her husband with committing adultery, will you say whether or not you know anything of this?

A. No. I don't know anything of him committing adultery.

27 Q. Then state what you do know.

A. Well, one night I was there calling on Mrs. Robinson's sister when he drove up in a car with a woman. He came in the house alone and asked me if we were going to please leave then that he had a girl outside he wanted to bring in.

Q. Did you leave immediately?

A. Yes.

Q. Is this all you know?

A. Yes.

And further this deponent saith not.

(Signed) FRANK M. WATKINS.

47 A. R. ANDERSON, a witness of lawful age, introduced on behalf of the plaintiff, being first duly sworn, deposes and says as follows:

By Mr. Hirschberg:

Q. State your name, age, residence and occupation?

A. A. R. Anderson, age 24 years, 6 E. Franklin Street, Richmond, Virginia, floorman at W. T. Grants Store.

Q. Are you acquainted with the parties to this suit?

A. Yes.

Q. How long have you known them?

A. About three and one-half years.

Q. Has the plaintiff in this case, Mrs. Robinson, been an actual bona fide resident of the State of Virginia and been domiciled in the City of Richmond for a period of more than one year next before the commencement of this suit?

A. Yes.

Q. Where did the parties to this suit last live and cohabit together as man and wife?

A. Richmond, Virginia.

Q. Mr. Anderson, in the bill of complaint of this case, Mrs. Robinson has charged her husband with adultery, please state what you know of this?

A. In June, 1928, Mrs. Robinson returned from work one night and found her husband there with another woman in one of the rooms with the lights out. She asked him about it and he admitted to her that he had intercourse with this woman.

Q. How did you happen to be there on this occasion?

A. I was living there. Rooming in their house.

48 Q. How long did you live there?

A. Eight or nine months.

Q. Was this the first time Mr. Robinson had brought this woman into his home.

A. No, indeed. He brought her there often.

Q. Where would Mrs. Robinson be?

A. She was a nurse and would be away from home a great deal on her cases.

Q. On this particular night you have mentioned, what time was it when Mrs. Robinson returned home?

A. I would say near midnight.

Q. Do you know the woman in question?

A. I only know she was called "Jenny."

Q. Do you know of any other acts of adultery?

A. No. But I heard he had lived with her as man and wife for several months, but I can't prove that.

And further this deponent saith not.

A. R. ANDERSON.

27 I, LLOYD M. RICHARDS, a Commissioner in Chancery in and for the City of Richmond, State of Virginia, do hereby certify that the foregoing depositions of Mar-

garet B. Robinson, A. R. Anderson and Franck Mortimore Watkins were duly taken, reduced to writing and signed by the witnesses at the time and place therein mentioned in the annexed notice.

In witness whereof, I have hereunto set my hand at the office of John Hirshberg, in the City and State aforesaid, this 20th day of February, 1930.

(Signed) LLOYD M. RICHARDS,
Commissioner in Chancery.

28

EXHIBIT A-3.

FINAL DECREE.

(Entered March 6, 1930.)

This cause, which has been docketed and regularly set for hearing as to the defendant, process having been regularly and duly served on the defendant and he having failed to appear, plead, answer or demur, came on this day to be heard, upon the bill of complaint and the exhibit therewith marked "A," upon the depositions of witnesses on behalf of the plaintiff regularly taken before a Commissioner in Chancery and duly filed and was argued by Counsel for the plaintiff.

On consideration whereof, it appearing to the Court from the evidence independently of the admissions of the parties in the pleadings or otherwise, that the plaintiff has been an actual bona fide resident of and had been domiciled in the City of Richmond, State of Virginia, for a period of more than one year next before the commencement of this suit, and that the plaintiff and defendant last lived and cohabited together at Richmond, Virginia.

And it appearing further to the Court independently of the admissions of the parties in the pleadings or otherwise,

that the charge of adultery set up in plaintiff's bill against the defendant, has been fully proved as therein alleged and that the said adultery occurred within five years immediately prior to the institution of this suit and that same was without procurement or connivance by the plaintiff and that same has not been condoned by her, it is adjudged, ordered and decreed that the said plaintiff, Margaret B. Robinson, be and she hereby is divorced from her said husband, John Auld Robinson, Jr., from the bond of matrimony, and that the said Margaret B. Robinson shall resume her maiden name of Margaret Brown Buchannan.

It is further ordered that neither the said Margaret B. Robinson nor the said John Auld Robinson, Jr. shall marry again within six months from the date of this decree as provided by Section 5113 of the Code of Virginia, 1919.

Nothing further appearing to be done in this cause, it is ordered that it be stricken from the docket and that the papers thereof be placed among the ended causes.

A Copy, *Teste*: (Signed) WALKER C. COTTRELL, *Clerk*.

EXHIBIT B.

31 HEALTH DEPARTMENT, DISTRICT OF COLUMBIA

TRANSCRIPT FROM THE RECORD OF BIRTHS REPORT OF A BIRTH

Use this form ONLY in case the child BREATHES or shows other evidence of LIFE after the child is altogether outside the mother's body; in other cases use the form provided for the reporting of STILLBIRTHS. If a stillbirth occurs in the practice of a midwife she must report it IMMEDIATELY to the coroner. This may be done through the nearest police station.

Place of birth: Columbia Hospital, 25th St. & Penna.
Ave. N. W.

Full name of child (If not named when this report is
made, parents should make supplemental report)

Sex of child: Male Date of birth: 5/12/38

Legitimate? Yes

FATHER

Full name Charles Drummond

Residence 4550 Conn. Ave. N. W.

Color White Age at last birthday 41 yrs.

Birthplace Georgia

Occupation Accountant

MOTHER

Maiden Name Margaret B. Buchanan

Residence Same

Color White Age at last birthday 35 yrs.

Birthplace Ga.

Occupation H. W.

Number of children born to this mother, including pres-
ent birth 1

Number of children of this mother now living 1

CERTIFICATE OF ATTENDING PHYSICIAN OR MIDWIFE

I hereby certify that I attended at the birth of this child,
and that it occurred on the 12th day of May 1938, at 12:05
P. M. and that the above information in so far as not based
upon my personal observation was furnished by Margaret
B. Buchanan Drummond, whose relationship to this child
is that of mother, and whose address is as above.

Signature of WILLIAM J. CUSACK
(Physician or midwife)

Address 1621 Conn. Ave. N. W.

Dated May 14, 38

Given name: Wiley Drummond added from supplemental report June 6, 1938

Remarks:

Correct js I.N. J. Washington, D. C., Feb. 25, 1942

The foregoing is a true and correct copy of a certificate of birth filed with the Health Department of the District of Columbia on May 19, 1938, and duly recorded in the records of said Department.

(Signed) GEORGE C. RUHLAND, M. D.
Health Officer, District of Columbia.

(Signed) ARTHUR G. COLE,
Chief Clerk.

EXHIBIT C-1.

32

IN THE CIRCUIT COURT
OF THE CITY OF RICHMOND, VIRGINIA

LINDA WILLINGHAM DRUMMOND
against
CHARLES C. DRUMMOND.

AMENDED BILL.

To the Honorable Julien Gunn, Judge of said Court:

Your complainant, Linda Willingham Drummond, respectfully represents:

. That, on the 2nd day of August, 1937, she exhibited in this court her original bill of complaint against Charles C. Drummond, wherein she set forth certain acts of cruelty committed by her husband toward her and certain other acts on his part which made it impossible for her to continue to

live with the above-named defendant, and thereupon she prayed that she be awarded a divorce from bed and board and that this court retain jurisdiction of said suit and enter such other and further orders as may be proper in the premises. And the said Charles C. Drummond has, at this time, failed to appear and answer the said bill.

That immediately after the filing of her aforesaid bill, to-wit, on August 2, 1937, and after a temporary absence from the City of Richmond on a visit to her sister, she returned to the apartment where she had previously resided with the above-named defendant and discovered for the first time that her husband had been occupying said apartment with another woman, to-wit, Margaret B. Buchanan, various articles of feminine wearing apparel not owned by this complainant being strewn over the apartment, and certain toilet articles belonging to a woman other than this
 33 complainant being established and arranged in a position on the furniture in such a way as to indicate that the owner thereof had been a permanent occupant.

That your complainant is further advised and so charges that, on or about August 6, 1937, complainant's husband left the City of Richmond, Virginia, in an automobile accompanied by a woman, one Margaret B. Buchanan, with whom he has been infatuated for some time, and proceeded to Lexington, Virginia, and did not return to the City of Richmond until two days later, to-wit, August 8, 1937. That, during the aforesaid period of time, to-wit, two nights and two days, complainant's husband and the said woman or some other woman to your complainant unknown, were alone together for long periods of time.

Your complainant further represents that, at various times, between August 2nd and August 23rd, the defendant has spent his leisure hours in company with another wom-

an, to-wit, Margaret B. Buchanan; these periods ranging from approximately one hour during the afternoon to several hours late at night, at which time he has entertained the said Margaret B. Buchanan at his apartment at 1633 West Grace Street, Richmond, Virginia, the said Margaret B. Buchanan and complainant's husband being alone together.

Your complainant further represents that the said defendant, Charles C. Drummond, has, since the filing of her original bill of complaint herein, committed adultery, that is to say, on the 23rd day of August, 1937, about the hour of 11:30 P. M., the said Charles C. Drummond, in company with a woman known as Margaret B. Buchanan, entered the apartment then occupied by the defendant at 1633 West Grace Street, Richmond, Virginia, and did then and there commit adultery with the said Margaret B. Buchanan.

That your complainant has not cohabited with her husband since obtaining the knowledge of said adultery,
34 nor since the filing of her original bill herein; and that, at the time of the institution of this suit, or at the time the complainant first obtained knowledge thereof, it had not been five years since the adultery occurred, and that it was not committed by the procurement or connivance of your complainant.

That the said Charles C. Drummond is leading an immoral and improper life, and he is not a proper person to have the custody, care, and education of her infant son.

Wherefore, your complainant prays that the said Charles C. Drummond may be made defendant to this amended bill; that the said Charles C. Drummond be required to answer this amended bill, but not on oath, answer under oath being hereby waived; that your complainant may be granted a divorce from the bonds of matrimony; and that Charles C. Drummond be restrained and enjoined from attempting to

communicate with the complainant's infant son, who is a child of tender years, to-wit, the age of eleven, until the further order of this court; and that your complainant may have all such further and other and general relief in the premises as the nature of her case may require or to equity shall seem meet.

LINDA WILLINGHAM DRUMMOND,
By Counsel.

(Signed) MCGUIRE, RIELY, EGGLESTON & BOCK,
Counsel.

35

EXHIBIT C-2.

FINAL DECREE.

(Entered November 30, 1937.)

This cause came on this day to be heard upon the complainant's bill and amended bill, and the exhibits filed therewith; the respondent's answer to said bill; the complainant's replication to the said answer; and the depositions taken before Sam B. Witt, a Commissioner in Chancery, and filed on behalf of the complainant and respondent; and was argued by counsel.

On Consideration Whereof, and it appearing to the court independently of the admissions of either party in the pleadings or otherwise, that the said parties were lawfully married on the 28th day of April, 1923; that the said respondent has committed adultery; that both the said Linda Willingham Drummond and Charles C. Drummond have resided and been domiciled in this state for more than one year next preceding the commencement of this suit; that the said Linda Willingham Drummond and Charles C. Drummond last cohabited in the City of Richmond; the court doth ADJUDGE, ORDER and DECREE that the said Linda Willingham Drummond and Charles C. Drum-

mond be divorced from the bond of matrimony which was created by the aforesaid marriage, and that the said marriage be, and the same hereby is, dissolved; and the court doth further ADJUDGE, ORDER and DECREE that the said Charles C. Drummond shall pay to the said Linda Willingham Drummond, as alimony and as an allowance for the maintenance and support of Meredith Drummond, the infant child of the said Linda Willingham Drummond and Charles C. Drummond, until further order of the Court, the sum of One Hundred and Seventy-five Dollars (\$175.00) per month, payable in installments of Eighty-seven and 50/100 Dollars (\$87.50) on the first and fifteenth of each month beginning November 15, 1937; that the care and custody of Meredith Drummond, the infant child of the said Linda Willingham Drummond and Charles C. Drummond, be awarded to the said Linda Willingham Drummond with whom he shall remain, but the said Charles C. Drummond shall have the privilege of visiting his infant son at such times and between such hours as may be convenient to the said Linda Willingham Drummond.

And it is ordered that Charles C. Drummond shall pay to McGuire, Riely, Eggleston & Boccock, attorneys for Linda Willingham Drummond, a fee of Three Hundred Dollars (\$300.00) for services rendered the complainant in this suit; and the said Charles C. Drummond shall likewise pay unto the said Linda Willingham Drummond the costs and expenses by her in this behalf expended including the fee of Sam B. Witt, Commissioner in Chancery, and the stenographer's fee for the taking of depositions herein; and, nothing further remaining to be done in this suit, it is further ordered that the same be removed from the docket but leave is reserved to the parties, or either of them to make application to this court for further orders as are authorized by law, and the Court reserves to itself the right to enlarge, reduce or increase the amount of alimony, but neither of the

parties hereto shall remarry within a period of six months from the date of the entry of this order.

A Copy, *Teste*: (signed) WALKER C. COTTRELL, *Clerk*.

42

EXHIBIT D-1.

IN THE JUVENILE COURT
OF THE DISTRICT OF COLUMBIA.

AFFIDAVIT OF COMPLAINANT.

Filed Jun 23 '38 Clerk, Juvenile Court, D. C.
District of Columbia, ss.:

On this 23 day of June, A. D. 1938 Margaret B. Buchanan personally came before me, Hilda R. Reagle, Clerk of the Juvenile Court of the District of Columbia in the said District, who, being duly sworn according to law, doth declare and say that she, the said Margaret B. Buchanan resides in the District of Columbia aforesaid; that she is single; that she was single at the time the said child was begotten; that bastard child was begotten in the District of Columbia or Virginia, on or about the 5th day of August, A. D. 1937, of one Charles Coburn Drummond who then had carnal knowledge of the body of her, the said complainant; that she was delivered of a male bastard child within two years, to wit: on the 12th day of May, A. D. 1938, at Columbia Hospital, Washington, D. C.

The said Margaret B. Buchanan therefore prays that the said Charles Coburn Drummond may be apprehended and held to answer this accusation, according to the form of the statute in such case made and provided.

(signed) MARGARET B. BUCHANAN.

Subscribed and sworn to before

me this 23rd day of June, A. D. 1938.

Hilda R. Reagle,

Clerk, Juvenile Court, D. C.

43

EXHIBIT D-2.
IN THE JUVENILE COURT
OF THE DISTRICT OF COLUMBIA.

June Term, A. D. 1938.

Filed Jun 23 '38 Clerk, Juvenile Court, D. C.

The District of Columbia, ss.:

ELWOOD H. SEAL, Esquire, Corporation Counsel in and for the District of Columbia, who for the United States prosecutes in this behalf, by Edward M. Welliver, Esquire, his Assistant, comes here into Court, at the District aforesaid on the 23 day of June 1938, in the said Term, and for the said United States gives the Court here to understand and be informed on the oath of Margaret B. Buchanan an unmarried mother, of the hereinafter mentioned bastard child Wiley, of the District of Columbia, that one Charles Coburn Drummond is the father of a certain male child begotten of the body of the said Margaret B. Buchanan who was single at the time said child was begotten, on or about the 5th day of August, 1937, of which the said Margaret B. Buchanan was delivered at Columbia Hospital on the 12th day of May, 1938, said time being within two years prior to date of the oath sworn to by Margaret B. Buchanan, the mother of said child and filed with the Clerk of the Juvenile Court of the District of Columbia on the 23 day of June 1938; that said child is now alive and was born a bastard and is now a bastard.

Whereupon, the Corporation Counsel, who in this behalf prosecutes in manner and form aforesaid, prays the consideration of the Court here in the premises, and that due proceeding may be had against the said Charles Coburn Drummond; that he be declared the father of said bastard, and that an order be made for the annual payment by him in money for the keeping, maintenance, and education of

said bastard child according to the statute in such case made and provided.

ELWOOD H. SEAL,
*Corporation Counsel in and for
the District of Columbia.*

By EDWARD M. WELLIVER,
His said Assistant.

Sworn to by Margaret B. Buchanan,
before me this 23rd day of June, A. D. 1938.

Hilda R. Reagle,
Clerk, Juvenile Court, D. C.

Margaret B. Buchanan, 4550 Conn. Ave., compl.
Charles Coburn Drummond, (Accty. Com. of the Nat. Assn.
in convention at Raleigh Hotel). Deft.

44

EXHIBIT D-3.

IN THE JUVENILE COURT
OF THE DISTRICT OF COLUMBIA.

UNITED STATES,

vs.

CHARLES COBURN DRUMMOND.

Docket No. 63848.

File No. W-58912.

The defendant, Charles Coburn Drummond, appearing before the Court, the case having been continued from September 14, 1938 for preliminary hearing, being duly arraigned entered a plea of guilty to the charge of nonsupport of bastard child;

Upon said defendant's plea of guilty, it is, this 28th day of September, 1938,

ORDERED, that defendant, Charles Coburn Drummond, furnish \$1,000 bond with security guaranteeing court judgment;

That said Charles Coburn Drummond pay \$364 annually, payable at the rate of \$15.16 semi-monthly on 3rd and 18th of each month until the child, Wiley Buchanan, reaches the age of 7 years, and thereafter pay \$650 annually, payable at the rate of \$54 monthly until said child reaches 14 years of age, to wit, May 12, 1952; the first payment due October 11, 1938, through the Clerk of the Court, payable to complainant Margaret B. Buchanan: and it is

FURTHER ORDERED that the requirement of bond be, and it is hereby suspended, and said defendant be, and he is hereby, placed on probation to the Court on conditions payments are made as ordered.

FAY L. BENTLEY,
Judge

Frank O'Connor, attorney.

39

EXHIBIT E.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Holding a Law Court

MARGARET B. BUCHANNAN, <i>Plaintiff</i> ,	} Law No. 90267. (Filed June 13, 1938.)
vs.	
CHARLES C. DRUMMOND, <i>Defendant</i> .	

DECLARATION.

I.

Margaret B. Buchannan sues Charles C. Drummond, Defendant, for that on to wit: the 15th day of June, 1937, in consideration of the said plaintiff, being then sole and unmarried, at the special request and instance of the said de-

fendant, had then undertaken and faithfully promised the said defendant to marry him, the said defendant, when said plaintiff should be thereunto requested, the said defendant undertook and faithfully promised the said plaintiff to marry said plaintiff, when he, the said defendant, should be thereunto afterwards requested. And said plaintiff avers that she confided in said promise and undertaking of said defendant, and has always from thence hitherto continued and still is sole and unmarried and has been at all times during the period aforesaid and still is, ready and willing to marry said defendant, whereof said defendant has always had notice. And said plaintiff says that after the making of said promise and undertaking of said defendant, to wit, on the day, month and year aforesaid, she requested said defendant to marry her yet said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, did not, nor would, at the times when he was so requested, nor at any other time before or afterwards, marry the said plaintiff, but has hitherto wholly neglected and refused and does still neglect and refuse so to do, but on the contrary, on or about the 31st day of May, 1938, the said defendant has, in violation of his promise and agree-

40 ment with said plaintiff, married another woman to the great damage of said plaintiff.

WHEREFORE, the plaintiff brings this suit and claims of the defendant the sum of Twenty-five thousand dollars (\$25,000.00) damages besides costs.

II.

Margaret B. Buchannan sues Charles C. Drummond, defendant for that on to wit, the 28th day of February, 1938, in consideration of the said plaintiff, being then sole and unmarried, at the special request and instance of the said defendant, had then undertaken and faithfully promised the

said defendant to marry him, the said defendant, when said plaintiff should be thereunto requested, the said defendant undertook and faithfully promised the said plaintiff to marry said plaintiff, when he, the said defendant, should be thereunto afterwards requested. And said plaintiff avers that she confided in said promise and undertaking of said defendant, and has always from thence hitherto continued and still is sole and unmarried and has been at all times during the period aforesaid and still is, ready and willing to marry said defendant, whereof said defendant has always had notice. And said plaintiff says that after the making of said promise and undertaking of said defendant to wit, on the day, month and year aforesaid, she requested said defendant to marry her yet said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, did not, nor would, at the times when he was so requested, nor at any other time before or afterwards, marry the said plaintiff, but has hitherto wholly neglected and refused and does still neglect and refuse so to do, but on the contrary, on or about the 31st day of May, 1938, the said defendant has, in violation of his promise and agreement with said plaintiff, married another woman, to the great damage of said plaintiff.

WHEREFORE, the plaintiff brings this suit and claims of the defendant the sum of Twenty-five thousand dollars (\$25,000.00) damages, besides costs.

(Signed) AUBREY B. FENNELL,
L. Q. C. LAMAR,
Attorneys for Plaintiff.

Notations:

Case discontinued with "Consent" of
Margaret B. Buchanan, Plaintiff 9/28/38.

"Withdrawn by Plaintiff's Attorneys" 10/1/38.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

MARGARET BUCHANAN, <i>Plaintiff</i> ,	}	Civil Action No. 12,718. (Filed June 22, 1943.)
vs.		
OTIS BEALL KENT, <i>Defendant</i> .		

50 **Motion to Strike Amended Answer to
Amended Complaint.**

Now comes Margaret Buchanan, plaintiff herein, by her Attorneys, and respectfully moves the Court to strike the amended answer to the Amended Complaint, filed herein by the defendant, Otis Beall Kent, and as reason therefor says:

1. For failure to comply with Rules 7(b), 15(a), 5(a) and 5(b), of the Federal Rules of Civil Procedure for the District Courts of the United States, in that, the defendant has not filed herein a motion in writing requesting leave of Court to file said Amended Answer and served the same on counsel for the plaintiff, and no order granting leave to file said Amended Answer has been signed by the Court, as is required by said rules.

SIMON, KOENIGSBERGER & YOUNG,
LESTER WOOD,
Attorneys for Plaintiff.

51 **Order Overruling Motion to Strike Amended
Answer to Amended Complaint.**

(Filed Oct. 13, 1943.)

Upon consideration of plaintiff's Motion To Strike Amended Answer to Amended Complaint and supporting

Points and Authorities, the defendant's Points and Authorities in Opposition to said motion, and argument of counsel, it is by the Court this 13th day of October, 1943,

ORDERED that plaintiff's Motion To Strike Amended Answer to Amended Complaint is hereby overruled with provision that the plaintiff may amend by specific objections to the amended answer and ten days are hereby granted to the defendant to file any supplementary written motions which he may deem appropriate and the plaintiff is granted fifteen days thereafter to file said specific objections.

F. DICKINSON LETTS,
Justice.

No objection as to form:

LESTER WOOD,
Attorney for Plaintiff.

**52 | Defendant's Motion to Add Supplemental Defense
| Number Eleven to Defendant's Amended Answer.**

(Filed Oct. 21, 1943.)

Now comes the defendant by and through his counsel and moves this Honorable Court for permission to supplement his amended answer heretofore filed, by including an eleventh defense, a copy of which is hereto appended and by reference made a part hereof; and for reasons therefor states as follows:

1. Plaintiff in the course of her deposition, completed on Tuesday, October 19, 1943, for the first time established of record the fact that she had regarded herself and claimed to have been the defendant's common law wife.

2. And for such other and further reasons as will be drawn to the attention of the Court at the time of argument herein.

JAMES R. KIRKLAND,
Attorney for Defendant.

53 **Amended Answer to Amended Complaint.**

(Filed Oct. 21, 1943.)

Proposed Eleventh Defense.

With leave of the Court first had and obtained, and further answering the complaint herein, the defendant avers that the plaintiff, in the course of her testimony adduced on deposition completed on Tuesday, October 19, 1943, for the first time admitted of record the fact that the plaintiff, prior to her assertion against the defendant of her instant claims alleging a breach of his alleged promise to have married her, had regarded herself as, and had so stated to the defendant, that she was his common law wife, which admission and assumption the defendant specifically denies; but the defendant submits that the plaintiff, having so regarded herself, and having insisted that she had been defendant's common law wife, should not now be heard to complain herein of the defendant's breach of his alleged promise to have made her his wife.

54 **Supplement to Motion to Strike Amended Answer to Amended Complaint Already Filed Herein,—By Way of Opposition to Said Amended Answer.**

(Filed Nov. 30, 1943.)

Now comes Margaret Buchanan, plaintiff herein, by her attorneys, and respectfully moves the Court to strike the

amended answer to the amended complaint, filed herein by the defendant, Otis Beall Kent, and for reason therefor refers to the supplemental memorandum attached hereto.

SIMON, KOENIGSBERGER & YOUNG,
LESTER WOOD,
Attorneys for Plaintiff.

55 **Memorandum of Points and Authorities in Support of Supplement to Motion to Strike Amended Answer to Amended Complaint Already Filed Herein,—By Way of Opposition to Said Amended Answer.**

The record will show that the defendant filed the original answer herein on November 3, 1941. Further, that one year and six months elapsed before any move was made by the defendant to file an amended answer. Not until the date set for the pre-trial of this cause on May 18, 1943, did the defendant make any request to file an amended answer herein. The date set for pre-trial was continued and the amended answer was filed herein on June 4, 1943. Under these circumstances, one year and seven months having elapsed between the date the original answer was filed and the date the amended answer was filed, we respectfully submit, that the filing of the amended answer should not now be permitted.

The amended answer should not be permitted for the further reason, that all of the alleged defenses contained therein, with respect to the claim contained in the amended complaint for breach of promise to marry, except the defense wherein the defendant denies that he promised
56 to marry the plaintiff, do not constitute legal defenses, because they do not make the plaintiff ineligible for marriage to the defendant, nor excuse the defendant from a promise to marry the plaintiff. Said defenses,

by the very allegations contained therein, show that the matters and things alleged therein were not known by the defendant at the time it is alleged he promised to marry the plaintiff, nor between that time and the date the plaintiff alleges the defendant refused to marry her. It is not claimed by the defendant that the promise of marriage, if made, was broken because of the matters and things alleged in said defenses. Therefore, if the promise of marriage was made it was breached by said defendant on some other indifferent ground than that claimed in said alleged defenses, and the plaintiff therefore has a right of action against said defendant. Under the facts and circumstances disclosed by the amended complaint and original answer, the latter of which likewise denies that the defendant promised to marry the plaintiff, as does the amended answer, if the plaintiff proves that the defendant did in fact promise to marry her she has a right of action against the defendant, notwithstanding the alleged defenses contained in the amended answer. Therefore said alleged defenses do not constitute legal defenses, but on the contrary amount to mere pleading of evidence by way of mitigation if anything, and for that reason should not be allowed as defenses. Under the law the pleading of evidence is not permitted.

The proposed 11th defense which the defendant requests be added to his amended answer shows on its
 57 face that it could not possibly constitute a legal defense to this action. In order for the plaintiff to become the common law wife of the defendant there would have to be a common law marriage recognized by the law and not something merely in the mind of the plaintiff or any other person.

SIMON, KOENIGSBERGER & YOUNG, By L. W.,
 LESTER WOOD,
Attorneys for Plaintiff.

58 **Order Granting Motion to Strike Certain
Defenses Contained in Amended Answer.**

(Filed Dec. 7, 1943.) ,

This cause having come on for hearing, and having been heard on the motion to strike the amended answer filed herein by the defendant, to the amended complaint, filed herein by the plaintiff, and the motion to add supplemental defense number eleven to the defendant's said amended answer, and the supplement to motion to strike said amended answer to said amended complaint, filed herein by the plaintiff, and having been argued by counsel for the respective parties, upon consideration thereof, it is, by the Court, this 7th day of December, 1943,

ORDERED, that the motion to strike the amended answer, filed herein by the plaintiff, with reference to defenses numbered third, fourth, fifth, sixth and tenth, and that part of defense numbered ninth which refers to and incorporates the said fifth defense as a part thereof—

all contained in said amended answer—be, and the
59 same hereby is, granted, and the defendant is hereby given ten days' leave within which to refile said amended answer with said numbered defenses not included therein, and it is further,

ORDERED, that the motion to add supplemental defense number eleven to the defendant's said amended answer, filed herein by the defendant, be, and the same hereby is, denied.

BY THE COURT:
F. DICKINSON LETTS,
Justice.

61 Motion for Judgment by Default for Failure to Answer.

(Filed Dec. 31, 1943.)

Now comes Margaret Buchanan, plaintiff herein, by her attorneys and respectfully moves the Court for judgment by default against the defendant, Otis Beall Kent, for his failure to file an answer herein, and for reason therefor refers to the memorandum of points and authorities attached hereto and made a part hereof.

SIMON, KOENIGSBERGER & YOUNG,
LESTER WOOD,
Attorneys for Plaintiff.

62 Memorandum of Points and Authorities in Support of Motion for Judgment by Default for Failure to Answer.

(Filed Dec. 31, 1943.)

Order granting motion to strike certain defenses contained in amended answer, entered herein on the 7th day of December, 1943. Said order provides that the defendant herein be given ten days' leave within which to refile said amended answer with said certain defenses not included therein. The ten days' leave given the defendant in said order within which to refile said amended answer expired on December 17, 1943, without the defendant having refiled said amended answer as provided by said order dated December 7, 1943. That said amended answer, with said certain defenses not included therein, has not yet been filed herein by the defendant.

That a notice of intention to apply for allowance of a special appeal was filed herein by the defendant on Decem-

ber 11, 1943, but no stay of the proceedings has been granted by this Court.

Notice of intention to apply for allowance of a special appeal does not operate to stay other proceedings in this action.

Rule 11 (e) of the General Rules of the United States Court of Appeals for the District of Columbia.

63 See Rule 55 (a) and Rule 55 (2) of the Rules of Civil Procedure for the District Courts of the United States.

SIMON, KOENIGSBERGER & YOUNG,
LESTER WOOD,
Attorneys for Plaintiff.

64 **Order Denying Motion for Default Judgment for Failure to Answer, but Requiring Defendant to Refile His Amended Answer Herein, in Accordance with Order Entered Herein on December 7, 1943.**

(Filed Jan. 17, 1944.)

This cause having come on for hearing, and having been heard on the motion for default judgment against the defendant for failure to answer, filed herein by the plaintiff, and the answer in opposition thereto, filed herein by the defendant, and having been argued by counsel for plaintiff and the defendant, in his own behalf, and thereupon, upon consideration thereof, it is, by the Court, this 17th day of January, 1944,

ORDERED, that the motion for default judgment against the defendant for failure to answer, filed herein by plaintiff, be, and the same hereby is, denied, provided, however, that the defendant be, and he hereby is, required to

refile, in accordance with the order entered herein by this Court on December 7, 1943, the amended answer filed by said defendant herein, and said defendant is hereby given an additional ten days' leave from the date hereof within which to refile said amended answer; and it is further,

ORDERED, that the refileing of said amended answer as provided herein shall not prejudice the rights of said
65 defendant to pursue and prosecute his application for the allowance of a special appeal to the United States Court of Appeals for the District of Columbia, now pending, and likewise shall not stay other proceedings in this action.

(s) T. ALAN GOLDSBOROUGH,
Justice.

UNITED STATES COURT OF APPEALS.
FOR THE DISTRICT OF COLUMBIA.

January Term, 1944

OTIS BEALL KENT, *Petitioner*

v.

MARGARET BUCHANAN, *Respondent*

and

OTIS BEALL KENT, *Petitioner*

v.

MARGARET BUCHANAN, *Respondent*

No. 8662

No. 8679

Before: Groner, C. J., and Miller, Edgerton and Arnold, JJ.

67

ORDER.

On consideration of the petition for special appeal from the order of Mr. Justice F. Dickinson Letts entered December 7, 1943, in Civil No. 12,718, Buchanan v. Kent, United States District Court, and of the petition for special appeal from the order of Mr. Justice T. Alan Goldsborough entered January 17, 1944, in the same cause, it is

ORDERED by the Court that special appeals from said orders be, and they are hereby allowed, and that further proceedings in said cause in the District Court be, and are hereby, stayed pending the disposition of these appeals.

IT IS FURTHER ORDERED that these appeals be, and they are hereby, consolidated, and that a consolidated rec-

ord be prepared in conformity with Rule 12(c) of this Court.

Dated January 27, 1944.

PER CURIAM.

68

Statement of Points on Appeal.

(In Special Appeals from Interlocutory Orders entered by Mr. Justice Letts, on December 7, 1943, and by Mr. Justice Goldsborough, on January 17, 1944.)

(Filed Feb. 3, 1944.)

Comes now the above-named Defendant, Appellant in Consolidated Causes Numbered 8662 and 8679, now pending as Special Appeals in the United States Court of Appeals for the District of Columbia, in his own behalf, and in support and furtherance of said Appeals respectfully notes the following Errors by the District Court:

1. Mr. Justice Letts, having definitely overruled the plaintiff's Motion to Strike the Amended Answer herein, with a proviso that the plaintiff might **"amend by specific objections"**, erred in entertaining or considering plaintiff's "Supplement" to overruled Motion, resubmitted in the textually identical terms of the original Motion, with no **"specific objections"** therein, and supported merely by generalizations in **"opposition to said amended answer"** in its entirety.

2. Mr. Justice Letts, in his Order of December 7, 1943, erred in granting the plaintiff's "motion to strike the amended answer", with reference to any part thereof, and with specific reference to the Defenses therein severally

numbered Third, Fourth, Fifth, Sixth and Tenth, and "that part of Defense numbered Ninth which refers to and incorporates the said Fifth Defense as a part thereof".

3. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike any portion
69 of the amended answer because of the alleged "insufficiency" of any of the Defenses therein asserted.

4. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike any portion of the amended answer because of any alleged "pleading of evidence" in any of the Defenses therein asserted.

5. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved in and under the Third Defense in his amended answer the therein-asserted invalidity of the plaintiff's antecedent purported divorce from her lawful husband, as a "sufficient", complete and conclusive defense to her breach-of-promise claims herein against the defendant-appellant.

6. Mr. Justice Letts, in his aforesaid Order, erred in his failure in effect therein to have held that the invalidity of a prior purported divorce in any such case is a "sufficient", complete and conclusive defense to the therein asserted claims for damages for a breach of a promise of marriage.

7. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the Third Defense in the amended answer because of any alleged "pleading of evidence" therein.

8. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved, in and

under the Fourth Defense in his amended answer, that the plaintiff had theretofore repeatedly stated to him and in his presence that she had been thrice married and only twice divorced, and that he had relied upon her said representations, as now estopping her from asserting any claim against him for any alleged breach of any alleged promise on his part to have married her.

70 9. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the aforesaid Fourth Defense, at least in so far as it may have provided a foundation for the introduction by the defendant-appellant of evidence in contravention or negation of her asserted claims that he had promised to marry her, and therefore in substantiation of the "unstricken" Second Defense in his amended answer.

10. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the Fourth Defense in his amended answer because of any alleged "pleading of evidence" therein.

11. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved, in and under the Fifth Defense in his amended answer, the plaintiff's prior record of unchastity, if unknown to him at the time of his alleged engagement to her, as a "sufficient", complete and conclusive defense to her impending claims against him for an alleged breach of his alleged promise to have married her.

12. Mr. Justice Letts, in his aforesaid Order, erred in his failure in effect therein to have held that the prior unchastity of any woman claiming damages for an alleged breach of an alleged promise of marriage in any such case, if unknown to the defendant at the time of his alleged en-

gement to her, is a "sufficient", complete and conclusive defense to said claims.

13. Mr. Justice Letts, in his aforesaid Order, erred in his failure in effect therein to have held that the defendant-appellant in the instant case might, and that the defendant in any such case may, plead and prove the plaintiff's antecedent record of unchastity, if unknown to said defendant at the time of his alleged engagement to her, as a complete defense to her breach-of-promise claims, even though he may not have learned of said culpatory facts until AFTER his refusal to have married her.

14. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the Fifth Defense in his amended answer because of any alleged "pleading of evidence" therein.

15. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved, in and under the Sixth Defense in his amended answer, the fact that the plaintiff herein had sued another man for breach of promise of marriage, and had voluntarily dismissed said action, within approximately twenty months preceding the date of her alleged engagement to the defendant-appellant, if not as proving her to be "claim minded", then at least as the foundation for the introduction by the defendant-appellant of evidence that the plaintiff herein, on both the dates of her alleged engagement to the defendant in said cited action, had known that he was then married to and undivorced from another woman.

16. Mr. Justice Letts, in his aforesaid order, erred in granting the plaintiff's motion to strike the Sixth Defense in his amended answer because of any alleged "pleading of evidence" therein.

17. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved, in and under the Ninth Defense in his amended answer, the plaintiff's prior record of unchastity as a "sufficient", complete and conclusive defense to her impending claims against him for slander.

18. Mr. Justice Letts, in his aforesaid Order, erred in his failure in effect therein to have held that the defendant-appellant in the instant action might, and that the defendant in any action for slander may, plead and prove the antecedent record of the plaintiff therein as a "lewd, lascivious, unchaste and immoral woman", as a "sufficient", complete and conclusive defense to a charge that said defendant had characterized said plaintiff as a "prostitute".

72 19. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the Ninth Defense in his amended answer because of any alleged "pleading of evidence" therein.

20. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved, in and under the Tenth Defense in his amended answer, his payment to the plaintiff herein of the sum therein mentioned, as a "sufficient", complete and conclusive accord and satisfaction of all her claims herein asserted against him.

21. Mr. Justice Letts, in his aforesaid Order, erred in granting the plaintiff's motion to strike the Tenth Defense in his amended answer because of any alleged "pleading of evidence" therein.

22. Mr. Justice Letts, in his aforesaid Order, erred in his denial of the defendant-appellant's motion to add to

his amended answer his proposed supplemental defense number Eleven, involving and based upon the plaintiff's imputedly-repeated assertions that she **had been** the "**common-law wife**" of the defendant-appellant, either as a substantive defense, or at least as negating her inconsistent assertion in her instant action against him that he had promised to make her his "**wife**" and had refused to do so.

23. Mr. Justice Letts, in his aforesaid Order, erred in his denial of the defendant-appellant's motion to have added to his amended answer his proposed Eleventh Defense, because of any alleged "pleading of evidence" therein.

24. Mr. Justice Letts, in his aforesaid Order, erred in having therein directed the defendant-appellant within ten days, or at any other time, to have refiled his amended answer, with the "numbered defenses" ordered stricken therefrom "not included therein".

73 25. Mr. Justice Letts, in his aforesaid Order, erred in his purpose and effort thereby to have divested the defendant-appellant of his right to have pleaded and proved every defensive fact alleged in his amended answer, including particularly the assertions in the hereinabove enumerated defenses ordered stricken therefrom, in mitigation of any damage otherwise recoverable by the plaintiff herein against the defendant-appellant.

26. Mr. Justice Letts, in his aforesaid Order, erred in having granted the plaintiff's motion to strike any portion of the amended answer, and in having failed to leave the same intact and unemasculated with respect to any and every defense therein asserted.

27. Mr. Justice Goldsborough, in his aforesaid Order of January 17, 1944, erred in entertaining, considering or determining any issue extraneous to the single legal issue

then before him, as to whether or not he should grant the plaintiff's motion for a judgment by default against the defendant-appellant.

28. Mr. Justice Goldsborough, in his aforesaid Order, being therein restricted to a proper consideration only of the aforesaid single legal issue, erred in his direction in said Order that the defendant-appellant refile his amended answer, "in accordance with the order entered herein by this Court on December 7, 1943."

29. Mr. Justice Goldsborough, in his aforesaid Order, being then apprised of the impendency of the defendant-appellant's petition for a Special Appeal from the aforesaid Order of December 7, 1943, and knowing or being chargeable with the knowledge that said petition might not be acted upon by the Court of Appeals within ten days or perhaps immediately thereafter, erred in directing the defendant-appellant to refile his amended answer, as aforesaid, within ten days, or thereafter until such time as said petition might conveniently have been acted upon by the Court of Appeals, as aforesaid.

74 30. Mr. Justice Goldsborough, having in terms expressly based his aforesaid Order "upon consideration" only of the plaintiff's motion for a judgment by default, the defendant-appellant's "answer in opposition thereto", and the issues therein presented and thereupon "argued by counsel for plaintiff and the defendant, in his own behalf", and being therefore uninformed of record as to any of the legal issues involved in and underlying the aforesaid antecedent Order of December 7, 1943, erred in directing the defendant-appellant to comply in terms or in substance with said Order, either within ten days or at any other time.

31. Mr. Justice Goldsborough, being uninformed as to any of the legal issues involved in or underlying the afore-

said Order of Mr. Justice Letts, as aforesaid, and therefore not having *judicially considered* the legality or the illegality of his action with respect to any of said issues, *arbitrarily* ratified, affirmed and adopted the pronouncements of Mr. Justice Letts on all said issues, and thereupon by said adoption committed each and every of the substantive errors committed by and hereinabove imputed to Mr. Justice Letts, under specifications numbered 1 to 26, inclusive; all said specifications being hereby referred to, and by this reference adopted and made parts hereof, as points on appeal from the aforesaid Order of Mr. Justice Goldsborough, to the same extent and with the requested same effect as if said errors were herein again particularized, and successively numbered 32 to 57, inclusive.

Respectfully submitted,

OTIS BEALL KENT,

Defendant-Appellant in his own behalf,

Presidential Apartments,

1026 Sixteenth Street, N. W.,

Washington, D. C.

APPELLANT'S REPLY BRIEF.

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

Consolidated Cases Nos. 8662 and 8679.

OTIS BEALL KENT, *Appellant*,

v.

MARGARET BUCHANAN, *Appellee*.

Special Appeals from Interlocutory Orders of the District
Court of the United States for the District of Columbia.

OTIS BEALL KENT,

Appellant, in his own behalf,

Presidential Apartments,

1026 Sixteenth Street, N. W.,

Washington, D. C.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JAN 22 1945

George L. Williams

CLERK

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

Consolidated Cases Nos. 8662 and 8679.

OTIS BEALL KENT, *Appellant*,

v.

MARGARET BUCHANAN, *Appellee*.

APPELLANT'S REPLY BRIEF.

Foreword.

In the absence from the Record on appeal of any reference to any verbal Motion by either party, or to any unrecorded ruling or comment thereon by either Justice of the District Court whose Order now is sought to be reviewed, the Appellant is ethically estopped from challenging the implications of the reiterated statement on pages 2 and 3 of the Appellee's Brief, that he had failed at any time to apply to the District Court for a stay of its proceedings in the case at bar. It is respectfully submitted, however, that any dereliction properly chargeable to the Appellant on that account was condoned, and the legal effect *if any* thereof

corrected, by the timely action of this Honorable Court in staying further action by the District Court, pending the disposition of the instant Appeals.

ARGUMENT.

Preliminary Summation: The Appellant's amended answer, and all the defenses therein assailed by the Appellee, were prepared and filed by a respected member of a highly reputable firm of attorneys, in whose judgment and professional skill in the drafting of appropriate pleadings the Appellant had reposed implicit confidence. If the Appellant then as now had been acting in his own behalf, he might have endeavored to anticipate and circumvent the Appellee's objections to the form and substance of the specified defenses, as legally insufficient and as pleading evidence. There might then have been no occasion for the present proceedings.

In any event, the pleadings finally drawn by his attorney appeared to the Appellant to reflect the provable facts, in sufficient detail to have precluded an occasion for a bill of particulars and, when fortified by the evidence to have been established by available depositions, to have constituted a satisfactory basis for a Motion to have dismissed the complaint.

The intended and obvious purpose of all the pleadings to which the Appellee has noted her objections was to secure to the Appellant the unquestionable right to prove all the facts which might be required to establish her reputation (1) as a truthful or untruthful person, and (2) as a virtuous and moral or an unvirtuous and immoral woman. The Appellant indulges no pride of authorship or of opinion as to the legal sufficiency or the technical propriety of any of the defenses in question, so long only as he may be unfettered by any limitation in his final pleadings upon his tender of defensive and probative evidence against the Appellee.

In *Kniffen v. McConnell*, 30 N. Y. 285, the answer in a breach of promise suit had merely denied the promise. Evi-

dence of the plaintiff's criminal intercourse with other men was held properly excluded, for the reason that it had not been pleaded by the defendant. In *Smith v. Braun*, 37 La. Ann. 225, it was held that the prior unchastity of the plaintiff in a breach of promise action *must be pleaded by the defendant*, as "*what is not alleged can not be proved*". In *Huggins v. Carey*, 149 S. W. 390, evidence of improper conduct between the plaintiff in a breach of promise action and other men was held properly excluded, in the absence from the defendant's pleadings of any attack upon her virtue.

In *Belm v. Patrick*, 293 Pac. 847, it was held that the plaintiff's unchastity, if relied upon as a defense to her breach of promise action against the defendant, must have been by him "*specially pleaded*"; and that, in the absence of such pleading, evidence of the plaintiff's unchastity might be "*considered only in mitigation of damages*"; (Citing *Reed v. Clark*, 47 Cal. 194; *Bowman v. Bowman*, 55 N. E. 422; *Harriman v. Layman*, 92 N. W. 710; *Bracken v. Dinning*, 132 S. W. 425; and *Cox v. Edwards*, 139 N. W. 1070). See also *Freeman v. Bennett*, 195 S. W. 238.

If the principles enunciated and reaffirmed in the foregoing decisions have correctly defined and constitute the law of the instant case, the inevitable effect of the hereincontroverted Orders of the District Court, unless reversed and modified or abrogated by this Honorable Court, will divest the Appellant of his rights, inherent in simple justice, to establish all the provable facts revealing and confirming the Appellee's long record of unchastity, either as a basis for refuting her pretension that the Appellant ever promised to marry her, as a substantive defense to her claims for his alleged breach of any such pretended promise, or as a defensive justification of his imputed characterization of her as a "*prostitute and a blackmailer*".

Certain it is that the filing of the Appellant's amended answer superseded and nullified the defenses comprehended in his original answer; and assuredly also the requirement in the Order of Mr. Justice Letts that the Appellant *refile*

his amended answer, with the objectionable defenses "not included therein", was and unless revoked is tantamount to an expungement of the amended answer in its entirety, subject only in practical effect to the right then reserved to the Appellant to submit a new and emasculated answer, which must have immunized the Appellee from any unhappy consequence of her unrighteous past.

If Mr. Justice Letts had merely directed that the specified defenses be expunged from the amended answer, with an explicit recognition of the modified pleading as a valid answer still of record in the case, his offending Order might at least not have been unconscionable; but the inescapable effect of said Order, in the state of the present record in the District Court, is that the Appellant has been thereby divested of any semblance of an answer to a maliciously persecutive suit for \$700,000.00, on behalf of a shamelessly immoral woman, in circumstances steeped in the triple-distilled essence of blackmail.

It is unthinkable that such a situation should subsist in a Court of Justice; and, regardless of the final judgment of this Honorable Court as to any of the definitive issues hereinafter presented, it is respectfully urged that both the indefensible Orders here in question be summarily reversed and remanded, with directions to the District Court to permit the Appellant to submit a de novo answer in conformity with accepted rules of pleading, but in clear exposition of the ultimate facts whereupon he may rely in defense of the Appellee's impending action against him.

The contentions of the Appellee's attorneys in their brief herein have been largely anticipated and answered in the Appellant's original brief; but their "specific objections" to the form or the substance of the controverted defenses, in so far as they may not heretofore have been considered, will be now discussed in the order of their presentation.

I. THIRD DEFENSE: That the Appellee, at the time of her alleged engagement to the Appellant, was a married woman, ineligible to remarriage or to an engagement to marry the Appellant.

The Appellant agrees with the conclusion expressed on page 4 of the Appellee's brief that the availability of his Third Defense, as such, is contingent upon his proof at a trial of the instant issues that the Appellee's divorce decree referred to in the amended answer was "void for lack of jurisdiction".

The Appellant, of course, understood and understands that his Third Defense would have failed as such, if the underlying decree had been merely voidable on a ground of fraud or otherwise; and his interpolation in his amended answer of the facts relied upon as constituting fraud were so introduced in a perhaps unrequired superabundance of caution, as an appropriate basis for his adduction of evidence clearly showing or tending to show that the Appellee is by nature not averse to self-serving perjury, or to recourse to fraudulent expedients.

The Appellant in the present action merely seeks an unrestricted right to prove, at any trial of the issues on the merits, that the Court which granted the Appellee's divorce decree had been wholly devoid of jurisdiction over either of the parties or of the subject matter of the decree, as stated in the Third Defense, because of the Appellee's perjured testimony as to her domiciliary status at the time the suit was instituted. The Appellant respectfully urges also that he be permitted to challenge the jurisdiction of the Richmond Court, under the controlling jurisdictional statutes, to have entered the decree or any decree on the basis of an alleged but uncorroborated confession by the Appellee's husband of an unproved and at least improbable act of adultery, except for which no decree of absolute divorce might lawfully have been granted to the Appellee.

If the asserted rights of the Appellant in the latter respects be assuredly reserved to him in the instant proceed-

ings, he will assent without further question to an elimination from his Third Defense of all the averments whereupon he might have shown that the decree was merely voidable at the instance only of one or the other of the parties thereto.

1. *Appellee's citations of authorities inapplicable to now unconceded issues:* If the Appellant be permitted by this Honorable Court to amend his Third Defense as hereinabove suggested, any occasion for a consideration of the applicability or the inapplicability of the decision of the Supreme Court of the United States in *Williams v. North Carolina*, 317 U. S. 287, cited on pages 5-6 of the Appellee's brief, will likewise have been averted. As stated by Mr. Justice Douglas, on page 302 of the majority opinion:

In the first place, we repeat that in this case we must assume that petitioners had a bona fide domicil in Nevada, *not that the Nevada domicil was a sham*. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident *as distinguished from a domiciliary* is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada. (Italics added).

Mr. Justice Frankfurter also, in his concurring opinion in the *Williams Case*, *supra*, observed, (page 306):

The duty of a state to respect the judgments of a sister state arises only where such judgments meet the tests of justice and fair dealing that are embodied in the historic phrase, "due process of law". But in this case all talk about due process is beside the mark. *If the actions of the Nevada court had been taken "without due process of law", the divorces which it purported to decree would have been without legal sanction in every state including Nevada. There would be no occasion to consider the applicability of the Full Faith and Credit Clause.* (Italics added).

The Richmond Court could not conceivably have entered the decree herein assailed by the Appellant, if the Appellee had not deliberately falsified her jurisdictional domicile, and had not committed a premeditated fraud in her assertion of the jurisdictional ground of her pretended action for divorce. The decree thereby induced was inherently invalid *ab initio*, in Virginia as well as in the District of Columbia, and everywhere else; and there can be no reasonable doubt that the District Court, upon a proper showing of the determinative facts, will abrogate the decree in question, if and when offered by the Appellee as "proof" of her asserted eligibility to an actionable engagement to have married the Appellant.

(a) APPELLANT'S APOLOGY FOR HIS INEXPLICABLE ERROR IN CITATION OF ADAIR CASE: The Appellant's reaction of first impression to the statement on page 7 of the Appellee's brief, that he had "mistakenly stated the facts and the rulings" of both courts in *Adair v. Adair*, 206 App. Div. 394, 201 N. Y. S. 398, was *incredulous amazement*, as he had devoted countless hours to a personal examination of all the cases cited in his brief; and he would almost have staked his life upon his conviction that he had committed no material error in his interpretation or his application of any of his cited precedents. As the official Reports of the affected decision were not immediately available, the Appellant reassured himself, by reference to a typewritten digest of the opinion which he had prepared from the published Report, that his analysis of the cited case *must have been* correct, and that the Appellee's attorneys *must have misread* his brief.

At the first available opportunity, however, the Appellant again examined the official report of the case; and he now ungrudgingly and humbly admits that he inadvertently if inexcusably transposed the rulings of the trial court and of the appellate court, and ascribed to each of them the reasoning and the judgment actually rendered by the other.

The digests of the cited case, and of hundreds of related decisions which constituted the basis of the Appellant's brief, were transcribed directly on a typewriter by a typist *then believed* to be trustworthy, at the Appellant's dictation from a line-by-line examination of every case; and he personally verified the accuracy of every direct quotation embodied in a cumulative transcript of more than four hundred pages of single spaced typewriting. Because of the urgency of his exhaustive task, however, the Appellant did not immediately read or have reread the transcript of any dictated digest, for corrective comparison with the printed text; and, as the material had been compiled nearly two years prior to the Appellant's preparation of his original brief, it was then impossible for him to have detected any error in the transcript of his abridgment of any decision. The occasion of the cited error is still as inexplicable to the Appellant as it could be to any one; and, in thanking the Appellee's attorneys for their kindly fairness in having thus brought the matter to his attention, the Appellant bespeaks his sincerely contrite apologies to all of them, as well as to every Justice of this Honorable Court, for his unintended but still reprehensible inadvertence.

In any event, in the light of the hereinafter proposed revision of the Appellant's Third Defense, to restrict its intended application to the jurisdictional infirmities *invalidating* the Appellee's divorce decree, the Appellant's acknowledged error in his citation of the *Adair Case, supra*, becomes innocuous and inconsequential, as the only purpose of its citation in the Appellant's original brief then was and still is his reliance upon the pronouncement of the appellate court that:

If the decree of annulment was void for lack of jurisdiction (Berlinsky v. Berlinsky, 204 App. Div. 480), this fact may be pleaded in any action in which the validity of such decree is involved. (Italics added).

The *Adair Case* was cited, *inter alia*, in *In Re Connolly*, 278 N. Y. S. 32, 154 Misc. 672, as authority for a decision that an original order of adoption then before the court was either—

* * * valid or it was *wholly void as without jurisdiction. If the latter, then it was the privilege of any interested party to attack it collaterally; and it would be the duty and obligation of any court in which the question was raised to disregard the order made.* (Italics added.)

On the unquestionable authority of the *Adair Case*, therefore, as correctly interpreted and applied by the Appellee's attorneys, her divorce decree, being provably "void for lack of jurisdiction," may be collaterally attacked" in any action in which the validity of such decree is involved," including assuredly the impending action of the Appellee. At the time of her assertion of her impending claims against the Appellant, she still was married to her lawful husband, and was therefore ineligible to an enforceable engagement to have married the Appellant.

In passing: the Appellee's attorneys state on page 7 of their brief that "upon discovery of * * * the concealment practiced by the defendant (in the *Adair Case*) the plaintiff left the defendant and did not cohabit with him *thereafter*." The factual finding in the court's opinion was that "*at no time did the plaintiff ever cohabit with the defendant.*" If the court has not *mistakenly stated the facts*, the marriage was never consummated; and the judgment of the trial court vacating the decree annulling the marriage might have been reversed on that ground alone, without determining "any of the other questions involved."

If the Appellant be permitted to amend his Third Defense as hereinafter suggested, the only material application of the decision in *Bennett v. Wilson*, 65 Pac. 880, 133 Cal. 379, cited on page 11 of the Appellee's brief, will be the court's reaffirmation of the uniformly-established principle that a void decree may be attacked at any time by any person

whose rights may be thereby adversely affected, as noted on page 21 of the Appellant's original brief.

The decree involved in the case of *Saul v. Saul*, 74 App. D. C. 287, 122 Fed. (2d) 64, cited on page 7 of the Appellee's brief, was held to have been merely voidable, and therefore not subject to collateral attack by a stranger to the suit.

The law of the case, as aptly applied in *Williams v. Igel*, 116 N. Y. S. 778, cited on page 13 of the Appellant's brief, is fully sustained by the herein and hereinbefore cited precedents, and by scores of other uncited but immediately available decisions which the Appellant has heretofore digested, to the same or a consistent effect; and upon these premises the Appellant respectfully suggests that his Third Defense be amended to read in substance, as follows:

Further answering paragraphs 2 and 3 of the amended complaint, the defendant avers that the plaintiff, on the date of the defendant's alleged promise to have married her, was married to another man, and was therefore ineligible to have engaged herself to marry the defendant; and that the plaintiff's said marital status was unchanged on the date of the defendant's alleged breach of their alleged engagement.

II. FOURTH DEFENSE: As to the Appellee's representations concerning her marital status precedently to her alleged engagement to the Appellant.

The inducing purpose of the Appellant's Fourth Defense was merely to establish an unassailable basis for his introduction of evidence proving or tending to prove the Appellee's habitual disregard for the truth, in any circumstance in which a lie might better serve her immediate purpose, as well as to safeguard the Appellant's rights to prove all the facts recited in his Fourth Defense, as negating the Appellee's pretension that he had knowingly engaged himself to marry a woman whom he believed to be still married to her undivorced third husband, and the father of her child, whom the Appellant then believed to be legitimate.

If the Appellee's attorneys, therefore, will now agree that the Appellant may cross-examine the Appellee, without

captious objection, and thereby prove the facts recited in the Fourth Defense; or that, if she should persist in her denials of the statements therein imputed to her, "the truth of which is denied" on page 13 of her brief, the Appellant may introduce the testimony of other and competent witnesses to prove the essential facts, which the Appellee's attorneys now admit "should be introduced as evidence and passed upon by the trial justice at the trial of the case," the Appellant will assent without further question to the proposed deletion of the Fourth Defense from his amended answer.

III. FIFTH DEFENSE: As to the defensive aspects of the Appellee's prior record of unchastity.

The conclusion expressed by the Appellee's attorneys on page 13 of their brief, that the Appellee's prior record of "unchastity does not constitute a defense" to her impending claims against the Appellant, is opposed by the overwhelming weight of judicial precedent. True it is that men on occasion have married known prostitutes, with full knowledge of their past derelictions; but, happily for the welfare of society, such occurrences have been so infrequent as assuredly not to indicate a social trend.

It would be a travesty upon common sense, therefore, as well as upon common justice, to impute to a man not known to have frequented the haunts of prostitutes a willingness to marry a woman of known prostitutional habitudes; and an undeniably reputable attorney of the Appellant's age, and of the social position which he has enjoyed in the community in which he has resided for more than forty years, must reasonably be assumed not knowingly to have engaged himself to marry a woman of unknown or questionable repute, and especially a woman of the now-established reputation of the Appellee for wanton and protracted immorality.

If such a man were to marry such a woman, without a prior knowledge of her legal disqualification for marriage, he might unquestionably have his marriage to her annulled

on that account. If he had merely become engaged to marry such a woman, he would have an unquestionable right to breach his engagement to her, upon his first ascertainment of her lascivious record, without accounting to her for damages for any such breach. And if, having become engaged to her, without an intimation of her evil reputation, he should breach his engagement to her upon some other ground, or upon no ground at all, he might plead her unchastity, if unknown to him at the time of his promise of marriage to her, as a complete defense to an action by her for a breach of that promise.

The only published decisions even tending to support the contentions of the Appellee's attorneys, that a man must have broken his engagement to an immoral woman immediately upon his first ascertainment of and solely upon the ground of her theretofore undisclosed lack of virtue, are *Bowman v. Bowman*, 153 Ind. 498, 55 N. E. 422, and *Shehan v. Barry*, 27 Mich. 217, cited on page 14 of the Appellee's brief. Neither of the cited cases, however, is supported by judicial authority, and neither of them is remotely applicable to any of the now unconceded issues in the instant case.

In the *Bowman Case*, the parties to a breach of promise action, having theretofore lived together for ten years as man and wife, and having been divorced, became engaged to remarry. The engagement was broken; and in a subsequent suit for its breach, the plaintiff alleged her seduction by the defendant in aggravation of damages. The defendant's answer "by implication" admitted his promise of marriage to the plaintiff, and pleaded her alleged unchastity as a bar to her action, without averring however, that her lack of virtue had been unknown to him at the time of their engagement. Upon these facts, it was held (page 504) that:

Where the defense in a suit for breach of marriage contract is the lewd and immoral conduct of the plaintiff, the *ordinary rule of evidence* requires that the defendant shall be *held to proof* under such a plea that

the contract was broken by him on that account, and *not upon some other ground not disclosed by the pleadings*. In this, as in all other cases, *the proof must respond to the allegation*. (Italics added)

The judgment in the plaintiff's favor in the *Bowman Case* was based upon the grounds (1) that the defendant had impliedly acknowledged his agreement to marry her; (2) that in his answer to her suit he had charged her with unchastity "*prior to her alleged seduction*" by him, when the seduction alleged in her complaint of his breach of promise had been averred merely in aggravation of damages; (3) that he had failed to plead in his answer that the plaintiff's unchastity had been unknown to him at the time of his admitted promise; and (4) that he had failed to prove that he had broken his engagement to marry the plaintiff on the ground of the "*lewd and immoral conduct*" imputed to her in his answer, "*and not upon some other ground not disclosed by the pleading.*"

The Appellant in the instant case has never agreed, nor by implication or otherwise ever admitted an agreement by him to have married the Appellee; she has never charged and can never charge him with seduction, in aggravation of damages or otherwise; he has pleaded his lack of knowledge of her unchastity at the time of his alleged engagement to marry her; and he has pleaded her provable unchastity as a final bar to her asserted claims against him.

The only material holdings in the case of *Shehan v. Barry*, 27 Mich. 217, were (1) that "*seduction may be proved in aggravation of damages*" in a breach of promise action; and (2) that "*when a man breaks off an engagement after he has seduced a woman, and does so on grounds furnishing no excuse or reason, if he on the trial produces evidence of her previous incontinence, before or during the engagement, of which he had no knowledge or suspicion before he broke it off, such evidence, if believed, will go in mitigation only, and not in bar of damages.*"

The latter mentioned rulings are inapplicable to any residual issue in the instant case; and even if they were so applicable, the pronouncement that a woman's unchastity, if unknown to the defendant at the time of his promise, is no defense to a breach of promise action, unless the engagement was broken on that account, is clearly opposed to the settled rule of law in such cases.

In *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28, cited also on page 31 of the Appellant's original brief, the defendant in a breach of promise action had averred in his answer that, if he had ever made the imputed promise, which he denied, he had been justified in breaking it, because of the plaintiff's unchastity. The trial court instructed the jury that if the defendant had abandoned the plaintiff "for any reason other than her fornication with another, such fornication would be no defense, though he would have been justified at the time of his abandonment in breaking his promise because of such fornication, if he had then known of it." The appellate court declared that the cited instruction of the trial court, "although supported by *Shehan v. Barry*, 27 Mich. 217, was erroneous so far as it applied to any act of fornication which was *not then known to him (defendant) and which accordingly he could not be said to have waived.*"

The legal principles determining the availability of a plea of unchastity as a bar to a breach of promise action are fully and comprehensively discussed on pages 24-32 of the Appellant's original brief; and it is respectfully requested that the Justices of this Honorable Court therewith concerned review the authorities therein relied upon by the Appellant in justification of his refusal to have married the Appellee.

On the basis of the legal principles thereupon established, the Appellant, with the approval of this Honorable Court, is willing to amend his Fifth Defense to read in substance, as follows:

Further answering paragraphs 2 and 3 of the amended complaint, the defendant avers that the plaintiff, at the time of his alleged engagement to have married her was, and for several years then past had been, a woman of ill repute; that intermittently over a period of several years she had lived in open adultery with a married man not her husband; that she had borne a bastard child to the husband of another woman, who had divorced him on the ground of his adultery with the plaintiff herein, whom she had named as the correspondent in her bill of divorce; that the plaintiff herein, prior to her acquaintance with the defendant, had been guilty of other acts of unchastity with other men to whom she had not been married; and that no intimation of her said ill repute and none of her said acts of unchastity had been disclosed to or was known by the defendant at the time of his alleged promise to have married her.

IV. SIXTH DEFENSE: As to the Appellee's prior suit for breach of promise against the father of her bastard child.

The Appellant agrees in substance with the conclusions expressed by the attorneys for the Appellee on pages 14-15 of their brief; but he respectfully submits that he is legally entitled to prove, at any trial of the instant issues on the merits, that the Appellee, at the time of her conception of her bastard child, had known that its father was married to and living with another woman; that she was merely playing in character when she sued the said father of her child, on a specious pretense that he had legally engaged himself to marry her; that she voluntarily dismissed her suit against him for a pittance, in contrast with the amount for which she had sued him; and that she had thereby revealed her motive in having brought the suit, as a desire for revenge because of his having cast her aside, rather than an expectation of pecuniary profit, which she had realized when she filed the suit that she could never recover from a man of his limited means; that she had not had explained to her and had no intelligent understanding of the legal

effects or implications of her aforementioned suit, or of its voluntary dismissal, but that all her said actions had been inspired and instigated by her then attorneys; that her studied efforts and determination to have attached herself to the Appellant herein, within less than two years after another man had broken her heart by his refusal to divorce his wife and marry her, had clearly revealed the motivation of her impending action against the Appellant; and any and every other related or incidental fact betokening the evil attributes which have characterized her every action within the knowledge and memory of the Appellant.

If the Appellant may be assured of his legal rights to prove the aforementioned facts concerning the Appellee's suit against the father of her bastard child, together with any other material facts which may come to light through the Appellant's investigation of the general subject, he will have no objection to an elimination of the Sixth Defense from his amended answer.

V. NINTH DEFENSE: As to the Appellee's prior record of unchastity invoked by the Appellant in defense of her slander suit against him.

In the absence from the Appellee's brief of any contention in opposition to the Appellant's arguments on pages 37-39 of his brief, in support of the Ninth Defense in his amended answer, the Appellant respectfully requests that this Honorable Court direct the District Court to permit the Appellant to retain his said defense intact, as stated in said answer.

VI. TENTH DEFENSE: As to the Appellee's Release of her asserted claims against the Appellant.

The Appellant's Tenth Defense, as phrased in his amended answer, correctly and succinctly states the ultimate facts relied upon by him as constituting a special release, accord and satisfaction of all the Appellee's asserted claims against him.

The Appellee's objections to the Tenth Defense, as stated on pages 15-16 of her brief, are apparently directed not so much to their legal effect and sufficiency, if proved, as to their proof at a trial of the instant issues on the merits; but the Appellee's attorneys need not therewith concern themselves, as the Appellant clearly understands that he shall have to prove the defensive value of the check referred to in his Tenth Defense, precedently to its acceptance by the District Court as an accord and satisfaction of the subject claims.

The astounding declaration by the Appellee's attorneys, on page 16 of their brief, that the "*Torrey v. Hardy* case supports the contention here made by the plaintiff," would indicate a failure on their part to have read and understood the decision, an indication confirmed by its incorrect citation as reported in 106 S. W. 1100, instead of 196 S. W. 1100. That the appellee's attorneys have never read or only casually read the decision may be further inferred from the fact that they have *mistakenly stated*, as a determinative fact of record in the case, that "the plaintiff in a letter written by her replying to the defendant's letter making the offer, *accepted the said \$400.00 in full settlement of her claim.*" The actual facts recited in the opinion of the court were that:

Prior to the 12th day of November, 1911, defendant had notified plaintiff in plain, unequivocal language that he would not marry her. She had already received from him up to that date \$650.00, and there is nothing in the record to indicate that he was indebted to her in any sum. While matters thus stood, she pointed out to defendant her construction of his alleged mistreatment of her, and demanded to know what he proposed to do. He replied on November 12, 1911, that if she would send his letters, "and letter cancelling our engagement" he would send her \$400. She wrote for the money, deceived him as to his letters, *did not mention the cancellation of their agreement, received from defendant the \$400.00, waited more than two years before commencing this action, and never at any time offered to return the \$400.00 aforesaid.* (Italics added).

Upon the foregoing facts, a directed verdict for the defendant was affirmed by the appellate court, on the grounds recited in the opinion, that:

We are decidedly of the opinion that the acts and conduct of plaintiff constituted an implied contract to cancel whatever agreement had been made between herself and defendant, in respect of their marriage, and to waive any additional claim for compensation or damage, on account of the alleged breach of said marriage agreement. Having accepted and retained the \$400.00 paid by defendant under the above circumstances, the plaintiff, *under the authorities of this State, as well as upon the plainest principles of justice, is estopped from maintaining this action.* (Citing *Wood v. Trust Co.*, 178 S. W. 201 and cases cited; *Tower v. Compton Hill Improvement Co.*, 91 S. W. 104; *Fox v. Windes*, 30 S. W. 323; *McFarland v. Railway Co.*, 28 S. W. 590; *Beavers v. Bank*, 163 S. W. 529). The fact that plaintiff deceived defendant in regard to his letters, and refrained from saying anything about cancelling the marriage agreement, when asking defendant to send her the \$400.00, does not help her case. *He was proposing to buy his peace for \$400.00 and be relieved from an unfortunate predicament.* Defendant's proposition for settlement was clear, concise, unambiguous and easily understood. *He was not indebted to plaintiff in the sum of \$400.00 or any other amount.* She wrote for the money and *did not intimate to defendant that she was asking it upon any other terms than those mentioned by him in his offer of settlement.* The trial court, upon the record before us, was fully justified in directing a verdict for defendant". (Italics added).

The facts of record in *Torrey v. Hardy*, *supra*, almost exactly parallel the negotiations between the Appellant and the Appellee, precedently to his delivery to her of the check referred to in his Tenth Defense. Exactly as in the *Torrey Case*, the Appellee has admitted in paragraph 3 of her amended complaint (App. 1) that the Appellant had stated to her "that he would not marry her". She has admitted in paragraph 6 of her amended complaint (App. 2) that she

had nursed the Appellant's Mother from October 20, 1939, until June 14, 1940, whereupon it will be understood that she had "already received from him" up to the date of her acceptance of the aforementioned check, an amount substantially in excess of the \$650.00 received by the plaintiff from the defendant in the *Torrey Case*; and "there is nothing in the record to indicate that he was (then) indebted to her in any sum". "While matters thus stood", as indicated in the second defense of the Appellant's amended answer (App. 9) "she demanded to know what he proposed to do", in response to her then request that he marry her. As clearly and correctly inferrable from the Appellant's Tenth Defense, he offered to give her \$100.00, "in consideration of her then acknowledgment to him that she had been fully compensated for all her services theretofore rendered" for him or at his instance, and "that said sum would be and was accepted by her in full and final settlement, accord and satisfaction" of all her asserted claims against him. The Appellant "was proposing to buy his peace for \$100 and be relieved from an unfortunate predicament". As stated in the Tenth Defense, she received from the appellant the \$100.00, on November 13, 1940, and "waited" nearly a year "before commencing this action"; and "there is nothing in the record to indicate" that she "ever at any time offered to return the \$100.00 aforesaid".

It is thereupon respectfully submitted that the check referred to in the Tenth Defense was given by the Appellant and accepted by the Appellee herein, as in final accord and satisfaction of all her now asserted claims against him; and that the said defense should be retained as stated in the Amended answer; and it is respectfully requested that this Honorable Court so direct the District Court herein.

VII. PROPOSED ELEVENTH DEFENSE: As to the Appellee's pretensions to the status of a "common law wife", in derogation of her asserted breach of promise claims against the Appellant.

If the Appellee sincerely and honestly regarded herself as the common law wife of the Appellant, as she is shown by the Appellant's rejected Motion to have stated under oath, she can not sincerely and honestly have believed that the Appellant had breached any promise to have married her. Her assertion of her breach of promise claims, therefore, after a consistent reiteration of her pretended claims to a common law marital relationship with the Appellant, clearly exemplifies her deliberate dishonesty in one or the other of her pretensions against him.

The primary purpose of the proposed Eleventh Defense was to establish a predicate for the Appellant's interrogation of the Appellee, with a view to ascertaining the extent if any to which her assertion of her breach of promise claims had been inspired by her attorneys, coincidentally with their suspected and imputed counsel to her that she could not maintain her suggested action for divorce against the Appellant as her alleged common law husband.

If the Appellant may be assured of his legal rights fully to explore the situation described in the proposed Eleventh Defense, he will admit without further question that there is no occasion for its inclusion in his amended answer.

CONCLUSION.

In summation, the Appellant again respectfully requests that the Justices of this Honorable Court who may charge themselves with the determinations of the instant appeals reconsider and review the arguments presented and the au-

thorities cited by the Appellant in support thereof, in his original brief as well as in this brief; and that the Orders of the District Court here under advisement be reversed or modified in the several respects hereinabove suggested, and remanded accordingly.

Respectfully submitted,

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